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EDITOR'S NOTE

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No. 86-231-AFX
Status: GRANTED

Title: Pension Benefit Guaranty Corporation, Appellant
v.
Yahn & McDonnell, Inc., et al.

Docketed:
August 14, 1986

Court: United States Court of Appeals
for the Third Circuit

Vide:
86-253

Counsel for appellant: Ford, Gary M.

Counsel for appellee: Taylor, Carl L.

Entry	Date	Note	Proceedings and Orders
1	Jul 8 1986		Application for extension of time to docket appeal and order granting same until August 19, 1986 (Brennan, July 9, 1986).
2	Aug 14 1986	G	Statement as to jurisdiction filed.
3	Sep 10 1986		Waiver of right of appellee Yahn & McDonnell, Inc. to respond filed.
4	Sep 24 1986		DISTRIBUTED. October 10, 1986
5	Sep 24 1986		REDISTRIBUTED. October 10, 1986
6	Oct 10 1986	F	Response requested.
7	Nov 6 1986		Motion of appellee Yahn & McDonnell, Inc. to affirm filed. VIDED.
8	Nov 12 1986		REDISTRIBUTED. November 26, 1986
9	Dec 1 1986		PROBABLE JURISDICTION NOTED. The case is consolidated with 86-253, and a total of one hour is allotted for oral argument. Justice White OUT.
			**
11	Dec 19 1986		Order extending time to file brief of appellant on the merits until January 30, 1987.
12	Dec 19 1986	G	Motion of appellants to dispense with printing the joint appendix filed.
15	Jan 12 1987		Motion of appellants to dispense with printing the joint appendix GRANTED. Justice White OUT.
16	Jan 30 1987		Brief amicus curiae of Natl. Coordinating Committee for Multiemployer Plans filed.
17	Jan 30 1987		Brief amicus curiae of United Mine Workers 1950 and 1974 Pension Plans filed.
18	Jan 30 1987		Brief of appellant United Retail and Wholesale Employees filed. VIDED.
19	Jan 30 1987		Brief of appellant Pension Benefit Guaranty filed.
21	Feb 10 1987		Order extending time to file brief of appellee on the merits until March 9, 1987.
22	Feb 13 1987		Record filed.
23	Mar 9 1987		Brief amicus curiae of Chamber of Commerce of the U.S. filed. VIDED.
24	Mar 9 1987		Brief of appellee Yahn & McDonnell, Inc. filed. VIDED.
25	Mar 9 1987		Brief amicus curiae of Flying Tiger Line, Inc. filed. VIDED.
26	Mar 11 1987		SET FOR ARGUMENT. Monday, April 27, 1987. This case is consolidated with No. 86-253. (4th case) (1 hour).
27	Mar 20 1987		CIRCULATED.
29	Apr 14 1987	X	Reply brief of appellant Pension Benefit Guaranty filed.

No. 86-231-AFX

Entry	Date	Note	Proceedings and Orders
			VIDED.
30	Apr 27 1987		ARGUED.

JURISDICTIONAL
STATEMENT

①

86-231
No.

Supreme Court, U.S.
FILED
AUG 14 [illegible]
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

PENSION BENEFIT GUARANTY CORPORATION, APPELLANT

v.

YAHN & MCDONNELL, INC., AND
THE PENNSTAR COMPANY, ET AL.

On Appeal from the United States Court of Appeals for the Third Circuit

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JURISDICTIONAL STATEMENT

EDWARD R. MACKIEWICZ *
General Counsel

MITCHELL L. STRICKLER
Deputy General Counsel

PETER H. GOULD
Deputy Assistant General Counsel

DAVID F. POWER
Attorney

Pension Benefit Guaranty Corporation
2020 K Street, N.W.
Washington, D.C. 20006
(202) 956-5020

* *Counsel of Record*

Of Counsel:
KENNETH S. GELLER
KATHRYN A. OBERLY
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. 1401(a)(3)(A), provides that, after the trustees of a multiemployer pension plan have made an initial determination of an employer's liability upon its withdrawal from the plan, their determination shall be accorded a presumption of correctness in any subsequent arbitration proceeding unless the employer shows by a preponderance of the evidence that the trustees' determination was unreasonable or clearly erroneous.

The question presented is whether Section 104(2) violates the Due Process Clause of the Fifth Amendment because of the supposed bias of the trustees.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan (the Pension Plan) and Robert E. Zimmer, Michael Paolella, John P. Morris, and James P. Smith, Jr., Trustees of the Pension Plan, were plaintiffs in the district court and appellees in the court of appeals.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

PENSION BENEFIT GUARANTY CORPORATION, APPELLANT

v.

YAHN & MCDONNELL, INC., AND
THE PENNSTAR COMPANY, ET AL.

On Appeal from the United States Court of Appeals for the Third Circuit

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-40a) is reported at 787 F.2d 128. The opinion of the district court (App. B, *infra*, 41a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 50a-51a) was entered on March 31, 1986. The Pension Benefit Guaranty Corporation, a wholly-owned government corporation and an agency of the United States, was granted leave to intervene post-judgment for the purposes of seeking rehearing and, if necessary, review in this Court (App. D, *infra*, 52a-53a). The PBGC's petition for rehearing was denied on April 23, 1986

(App. E, *infra*, 54a-55a). The PBGC filed a notice of appeal to this Court on May 21, 1986 (App. F, *infra*, 56a-57a). On July 9, 1986, Justice Brennan extended the time for docketing the PBGC's appeal to and including August 19, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. 1001 *et seq.*, are set forth at App. H, *infra*, 60a-67a.[1] The provision of the statute held unconstitutional by the court of appeals is Section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. 1401(a)(3)(A), which provides:

> For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

STATEMENT

A. The Statutory Background.

The history of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208, has been described in detail by this Court in *Connolly* v. *PBGC*, 106 S. Ct. 1018, 1021-1022 (1986), and *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 721-723 (1984). In brief, it became apparent to Congress that

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[1] ERISA was recently amended, in respects not relevant to this case, by the Single-Employer Pension Plan Amendments Act of 1986, enacted as Title XI of the Consolidated Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-272, 100 Stat. 237 *et seq.*

the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, "did not adequately protect plans from the adverse consequences that resulted when individual employers terminate[d] their participation in, or [withdrew] from, multiemployer plans." *Gray*, 467 U.S. at 722. Congress further concluded that ERISA created undesirable incentives for employers to withdraw, leaving plans with inadequate funding. The absence of effective withdrawal liability provisions encouraged a " 'last man out' mentality, with employers withdrawing from plans to avoid possible plan termination liability." 126 Cong. Rec. 20178 (1980) (remarks of Sen. Javits).

The MPPAA was designed primarily to discourage employer withdrawals from multiemployer pension plans, while at the same time not acting as a disincentive to new employers who might consider becoming contributors to such plans. See H.R. Rep. No. 96-869, Pt. II, 96th Cong., 2d Sess. 15 (1980); *Connolly*, 106 S. Ct. at 1021-1022; *Gray*, 467 U.S. at 721-723. As the Court stated in *Connolly*, 106 S. Ct. at 1026, the MPPAA "safeguards the participants in multiemployer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan." Thus, "the Act requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of vested benefits and the current value of the plan's assets." *Gray*, 467 U.S. at 725, quoted in *Connolly*, 106 S. Ct. at 1022. Various determinations made by the trustees in the process of collecting this debt are presumed correct under Section 104(2) of the MPPAA, 29 U.S.C. 1401(a)(3), "in order to ensure the enforceability of employer liability." H.R. Rep. No. 96-869, Pt. I, *supra*, at 86.

B. The Statutory Process For Determining Withdrawal Liability.

Withdrawal liability is an employer's statutory share of the pension plan's "unfunded vested benefits." 29 U.S.C. 1381(b). "Unfunded vested benefits" are "(A) the value of nonforfeitable benefits under the plan, less (B) the value of the assets of the plan." 29 U.S.C. 1393(c). The plan sponsor [2] determines the employer's share of unfunded vested benefits by using one of several allocation methods specified in 29 U.S.C. 1391. The "presumptive" or "basic" method of allocation, which was employed in this case, is set forth in Section 1391(b), and alternative allocation methods are set forth in Sections 1391(c)(2), (3) and (4). In addition, the Act permits the plan sponsor to use an allocation method of its own design, subject to the PBGC's approval based on the PBGC's determination that the plan's method will "not significantly increase the risk of loss to plan participants and beneficiaries or to the [PBGC]." 29 U.S.C. 1391(c)(5)(A).[3] The MPPAA requires that the allocation method applied to a specific withdrawal may not be different from the plan-wide method in effect on the date of that withdrawal, and the Act further requires uniform application to all withdrawing employers of whichever allocation method the plan sponsor has selected. 29 U.S.C. 1394. See H.R. Rep. No. 96-869, Pt. I, *supra*, at 85.

Under the presumptive method of allocation, the plan sponsor must determine a withdrawing employer's proportional share of each of three different categories of unfunded vested benefits. 29 U.S.C. 1391(b)(1)(A), (B) and (C). These shares are derived from fractions comparing the employer's contributions to the plan to the contributions made by all employers to the plan during the same periods. 29 U.S.C. 1391(b)(2)(E)(ii), 1391(b)(3)(B), 1391(b)(4)(D)(ii).

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[2] The "plan sponsor" of a multiemployer pension plan is defined in 29 U.S.C. 1301(a)(10)(A) as the plan's joint board of trustees.

[3] See H.R. Rep. No. 96-869, Pt. I, *supra*, at 77:

> The bill provides a basic method for determining an employer's withdrawal liability, three alternative methods which a plan may elect, and allows plans to develop additional allocation methods. The basic method[] is the one that applies unless a plan is amended to adopt a different method.

The amount of an employer's withdrawal liability also depends on the value of the plan's unfunded vested benefits (nonforfeitable benefits minus assets) that are subjected to the allocation process. In calculating the value of nonforfeitable benefits under a pension plan, it is necessary to use certain "actuarial assumptions and methods," which either must follow regulations that the PBGC is authorized to issue [4] or be "reasonable" and "offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. 1393(a).

As soon as practicable after an employer's withdrawal from a pension plan, the plan trustees must notify the employer of "the amount of the liability" and "the schedule for liability payments" and make demand for payment. 29 U.S.C. 1399(b)(1). The employer may then ask the plan trustees to review any specific matter relating to the determination of liability, may identify any inaccuracies in the determination, and may "furnish any additional relevant information." 29 U.S.C. 1399(b)(2)(A). The trustees must review the issues raised by the employer and notify the employer of their decision and the basis for it. 29 U.S.C. 1399(b)(2)(B).

The MPPAA also prescribes procedures to be followed if, after the above-described steps, a disagreement remains between the pension plan and the employer over any determination made by the plan trustees relating to the employer's withdrawal liability. 29 U.S.C. 1401.

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[4] The PBGC has not yet decided whether to promulgate regulations concerning appropriate actuarial assumptions.

Either the employer or the plan may initiate arbitration, which must be conducted "in accordance with fair and equitable procedures" (29 U.S.C. 1401(a)(2)) that have been promulgated by the PBGC.[5] Section 1401(a)(3)(A) of the MPPAA, the provision found unconstitutional by the court of appeals, provides that:

> For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

The Act also accords a presumption of correctness to the actuarial assumptions and methods used to determine a plan's unfunded vested benefits. 29 U.S.C. 1401(a)(3)(B).

Congress explained that "[t]hese [presumptions] are necessary in order to ensure the enforceability of employer liability. In the absence of these presumptions, employers could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination." H.R. Rep. No. 96-869, Pt. I, *supra*, at 86. See also Sen. Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *S. 1076: The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* 20-21 (Comm. Print 1980) [hereinafter cited as *Senate Labor Summary*].[6]

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[5] *Arbitration of Disputes in Multiemployer Plans*, 50 Fed. Reg. 34679 (1985) (to be codified at 29 C.F.R. Pt. 2641).

[6] The *Senate Labor Summary* stated (at 20-21):

> The Committee includes the presumption to reduce the likelihood of dispute and delay over technical actuarial matters with respect to which there are often several equally "correct" approaches. Without such a presumption, a plan would be helpless to resist dilatory tactics by a withdrawing employer—

Finally, the MPPAA vests the federal district courts with jurisdiction to review the arbitrator's final decision. 29 U.S.C. 1401(b)(2). In any such proceeding, "there [is] a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 29 U.S.C. 1401(c).

C. The Facts Of This Case.

1. Yahn & McDonnell, Inc. (Yahn) entered into a series of collective bargaining agreements with United Retail and Wholesale Employees Teamsters Union Local No. 115 (the Union) (C.A. App. 15), the last of which was a three-year agreement executed in January 1980 (C.A. App. 7, 15).[7] These collective bargaining agreements required Yahn to make contributions to the United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan (App. A, *infra*, 6a).

The Pension Plan is a multiemployer pension trust established under Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. 186(c)(5), and a "multiemployer plan" within the meaning of ERISA, 29 U.S.C. 1002(37)(A) (C.A. App. 5). The Plan is administered by four trustees, two of whom were appointed by contributing employers and two of whom were appointed by the Union (App. A, *infra*, 6a). The trustees are "fiduciaries" within the meaning of ERISA, 29 U.S.C. 1002(21)(A).

Yahn made all of the contributions required by the collective bargaining agreements until November 1981, when it ceased operations and withdrew from the Pen-

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> tactics that could, and could be intended to, result in prohibitive collection costs to the plan. The presumption can be rebutted in those cases where injustice would otherwise result to the withdrawing employer.

[7] The court of appeals' opinion incorrectly states that Yahn's last agreement with the Union was executed in December 1980. See App. A, *infra*, 6a.

sion Plan (App. A, *infra*, 6a). In April 1982, the Plan issued a demand for payment of approximately $458,000 in withdrawal liability (*ibid.*).[8] In its demand for payment, the Plan stated, *inter alia*, that it had elected to use the presumptive method for determining Yahn's liability and that, "[u]nder this method, the Fund Actuary, Peat, Marwick, Mitchell & Co., has determined the withdrawal liability of Yahn & McDonnell, Inc." (C.A. App. 46, 109).

In July 1982, Yahn made a request for review of the liability determination (App. A, *infra*, 7a). Yahn requested consideration of several specific issues, including the actuarial assumptions employed to calculate the Plan's unfunded vested benefits (C.A. App. 56). The trustees reviewed their initial assessment of liability at a meeting attended by counsel for the Pension Plan, counsel for Yahn, and two employees of Peat, Marwick, Mitchell & Co., the Plan's actuary (C.A. App. 102-116). At the conclusion of the trustees' review, Yahn was advised that the withdrawal liability assessment would not be altered (App. A, *infra*, 7a).

Yahn invoked its right to arbitration, but the arbitration proceeding was placed in abeyance pending resolution of the constitutional issues raised by Yahn in this litigation (App. A, *infra*, 7a). No arbitration proceeding has ever been conducted concerning Yahn's specific disagreements with the trustees' assessment of withdrawal liability.

2. The Pension Plan and its trustees commenced this action in the United States District Court for the Eastern District of Pennsylvania to collect Yahn's withdrawal liability (App. A, *infra*, 7a). In its answer, Yahn raised numerous constitutional challenges to the MPPAA; among other things, Yahn asserted that the MPPAA denied it due process because the initial determination of liability was made by biased trustees (*ibid.*). After briefing, the district court upheld the MPPAA against all of Yahn's constitutional attacks, but dismissed the Plan's request for attorneys' fees, costs, and liquidated damages (App. B, *infra*, 41a-49a).

Yahn appealed from the adverse judgment against it, and the Pension Plan appealed from the denial of attorneys' fees, costs, and liquidated damages. Relying on "Congress' obvious desire to ensure the solvency and stability of pension plans" (App. A, *infra*, 12a), the court of appeals first affirmed the district court's ruling that the MPPAA authorizes the Plan to maintain an action to collect withdrawal liability payments pending arbitration. Thus, the court of appeals upheld the district court's award of interim liability payments to the Plan (*ibid.*). Second, the court of appeals agreed with the Plan that the MPPAA compels an award of attorneys' fees, costs, and liquidated damages upon a judgment in favor of a pension plan for delinquent payments. With respect to this issue, therefore, the court of appeals reversed the district court's ruling that such an award would be premature prior to arbitration (*id.* at 13a-14a).

Finally, in a divided decision, the court of appeals reversed that portion of the district court's judgment upholding the MPPAA against Yahn's procedural due process challenge. The court of appeals did not question the district court's conclusion that the statutory presumptions of correctness "survive a substantive due process analysis and a *Mathews* [v. *Eldridge*, 424 U.S. 319 (1976)] test" (App. A, *infra*, 28a; *id.* at 32a-33a n.24), but it held that the district court erred in failing to analyze the alleged bias of the trustees separately from the adequacy of the procedural safeguards built into the review process (*id.* at 19a). Thus, the court of appeals analyzed Yahn's procedural due process claim under cases such as *Schweiker* v. *McClure*, 456 U.S. 188 (1982); *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238 (1980); *Gibson* v. *Berryhill*, 411 U.S. 564 (1973); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); and *Tumey* v. *Ohio*, 273 U.S. 510 (1927).

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[8] The Plan advised Yahn that the Plan reserved the right to look to Yahn's parent company, appellee Pennstar, for payment if Yahn could not afford to pay the withdrawal liability itself. See 29 U.S.C. 1301(b); App. A, *infra*, 6a-7a & n.2.

Although the court of appeals acknowledged (App. A, *infra*, 16a) that its decision was contrary to that of every other circuit to consider the issue,[9] the court held that multiemployer pension plan trustees are "biased" in favor of maximizing collections of withdrawal liability because the trustees have fiduciary duties of loyalty to the plan under Section 404 of ERISA, 29 U.S.C. 1104, and may be subject to personal liability for violating those duties under Section 409 of ERISA, 29 U.S.C. 1109 (App. A, *infra*, 21a-25a). The court further held that the trustees' "manifest and significant bias" (*id.* at 24a) was not cured by limits on the scope of their decisionmaking authority (*id.* at 25a-27a). Instead, the court was of the view that the trustees have broad discretion to (1) select from among four statutory methods, or their own method, for allocating withdrawal liability; (2) determine appropriate actuarial "discount rates"; and (3) determine the applicability of several statutory exemptions to the Act's withdrawal liability provisions (*ibid.*). Accordingly, the court concluded that the trustees' role is "adjudicative" because "[t]he trustees perform the judicial task of making *case-by-case determinations* significantly affecting the property of employers" and "must frequently make complex legal and factual determinations" (*id.* at 26a-27a n.18 (emphasis added)). Finally, the court held that the opportunity for further review—specifically, the right to invoke arbitration and review in federal district court—did not remove the taint of the trustees' bias because, under the statutory presumptions of correctness, any subsequent proceedings would themselves be tainted by the initial decision of the supposedly biased trustees (*id.* at 27a-28a).

For relief, the court of appeals determined that the statutory presumption of correctness accorded the trustees' liability determinations in arbitration could be severed from the remainder of the statute (App. A, *infra*, 28a-33a).[10] Thus, the court rewrote the statute to require de novo determinations of withdrawal liability in arbitration proceedings. Such de novo proceedings, the court held, would satisfy the constitutional requirement of an impartial decisionmaker (*id.* at 31a-32a).[11]

Judge Seitz dissented from the majority's resolution of the constitutional question. He took issue with the court's view of the breadth of discretion available to the trustees in making determinations of withdrawal liability (App. A, *infra*, 35a-39a), concluding that "whatever residual discretion the trustees enjoy is [not] inconsistent with due process" (*id.* at 39a). Judge Seitz also expressed concern that the court's invalidation of the statutory presumption of correctness "promises to frustrate severely the congressional enforcement scheme. Without the presumption the plan may well, as Congress feared, 'be helpless to resist dilatory tactics by a withdrawing employer —tactics that could, and could be intended to, result in prohibitive collection costs to the plan' " (*id.* at 40a (quoting *Senate Labor Summary* 21)).

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[9] See *Keith Fulton & Sons, Inc.* v. *New England Teamsters & Trucking Industry Pension Fund*, 762 F.2d 1137 (1st Cir. 1985) (en banc); *Bd. of Trustees* v. *Thompson Bldg. Materials, Inc.*, 749 F.2d 1396 (9th Cir. 1984), cert. denied, 105 S. Ct. 2116 (1985); *Washington Star Co.* v. *Int'l Typographical Union Negotiated Pension Plan*, 729 F.2d 1502 (D.C. Cir. 1984); *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 725 F.2d 843 (2d Cir.), cert. denied *sub nom. Sibley, Lindsay & Curr Co.* v. *Bakery, Confectionery & Tobacco Workers Int'l*, 104 S. Ct. 3554 (1984); *Republic Industries, Inc.* v. *Teamsters Joint Council No. 83*, 718 F.2d 628 (4th Cir.), cert. denied, 104 S. Ct. 3553 (1984).

[10] The court of appeals struck down only subparagraph (A) of Section 1401(a)(3), which accords a presumption of correctness to the trustees' determinations of liability and their application of various exemptions and mitigating provisions authorized by the Act. However, in its discussion of specific decisions purportedly made by the trustees, the court appeared to find that the selection of actuarial assumptions posed the greatest risk of harm to withdrawing employers (App. A, *infra*, 18a, 26a). Yet the court did not in terms invalidate the presumption of correctness contained in subparagraph (B) of Section 1401(a)(3), which applies expressly to actuarial assumptions.

[11] Upon learning that the court of appeals had held a provision of the MPPAA unconstitutional, the PBGC filed a motion to intervene for the purposes of seeking rehearing and further review, if necessary, in this Court. The court of appeals granted the PBGC's motion to intervene (App. D, *infra*, 52a-53a), but it denied rehearing (App. E, *infra*, 54a-55a).

The PBGC's petition for rehearing en banc was denied over the dissenting votes of four judges (App. E, *infra*, 54a-55a).

THE QUESTION IS SUBSTANTIAL

In conflict with the decisions of five other courts of appeals, the Third Circuit has invalidated a statutory presumption designed to assist multiemployer pension plans in collecting withdrawal liability payments required under the MPPAA. The court of appeals erred in concluding that the trustees of multiemployer pension plans have a personal interest in maximizing collections of withdrawal liability, and it seriously misapprehended the scope of discretion accorded to the trustees in determining withdrawal liability. Thus, the court erroneously relied on the "biased decisionmaker" cases to strike down a central component of Congress's scheme to improve the financial stability of multiemployer pension plans.

The court of appeals' unfounded requirement of de novo arbitration proceedings threatens to increase substantially the number and complexity of such proceedings. Absent the presumption invalidated by the court below, multiemployer pension plans will experience added delays and incur increased costs in collecting withdrawal liability. The resulting interference with enforcement of employer obligations could significantly drain the resources of many plans and of the PBGC's financial assistance fund. The question presented is thus of substantial practical importance and warrants plenary review by this Court.

A. Multiemployer Pension Plan Trustees Do Not Operate Under A Fiduciary Duty To Maximize Withdrawal Liability.

The court of appeals concluded (App. A, *infra*, 19a-20a) that the instant case is controlled by this Court's "biased decisionmaker" cases, in which the Court has sustained due process challenges to the vesting of judicial or adjudicative functions in persons having a financial or personal interest in the outcome of the proceeding. See, *e.g., Gibson* v. *Berryhill*, 411 U.S. 564 (1973); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972). Thus, the court of appeals placed considerable emphasis (App. A, *infra*, 22a) on the trustees' role as fiduciaries under ERISA in reaching the conclusion that their personal interests would motivate them to maximize withdrawal liability assessments. But the trustees' statutory obligations are more complex than the fiduciary duties of trustees in other commercial contexts, whose sole concern is to make investments and take steps that will protect and increase the corpus of their trust. Congress expressly considered the role of trustees under the MPPAA and gave them a broader, multifaceted assignment (H.R. Rep. No. 96-869, Pt. I, *supra*, at 67):

> Plan fiduciaries are given a great deal of flexibility to strike a balance among competing considerations of encouraging new entrants, discouraging withdrawals, easing administrative burdens and protecting the financial soundness of a fund. The committee wishes to make it clear that in choosing the rules that would eliminate or reduce liability, the choice of such a rule is not *per se* a violation of * * * fiduciary standards; the determination must be made as to whether the fiduciary has acted reasonably and in

the interests of plan participants and beneficiaries and otherwise in accordance with the fiduciary standards.

Accordingly, as Judge Seitz recognized in dissent, "the fiduciary duty of the trustees to the fund beneficiaries does not entail a duty to assess the largest reasonable liability against a withdrawing employer" (App. A, *infra*, 37a). The First Circuit made the same point in *Keith Fulton & Sons, Inc.* v. *New England Teamsters & Trucking Industry Pension Fund*, 762 F.2d 1137, 1142-1143 (1985) (en banc):

> This commentary [from the House Report] makes it clear that the trustees' role is not simply to find the highest value for withdrawal liability; they would not meet their fiduciary duty to the fund, for example, if they set excessively high withdrawal liabilities which would have the effect of discouraging future participation.

In short, the court of appeals clearly misapprehended the effect of the fiduciary duties of multiemployer pension plan trustees. While it is true that they owe their loyalty to the plan, it is *not* true, as the court of appeals assumed (App. A, *infra*, 21a), that that duty of loyalty is necessarily fulfilled by maximizing withdrawal liability assessments. The trustees must also consider whether *minimizing* withdrawal liability assessments would further Congress's goal of long-term financial stability by encouraging other employers to enter the plan. What the court of appeals termed the trustees' "manifest and significant bias" (*id.* at 24a) is not "bias" at all; instead, it is a statutory duty to act in the best interests of the pension plan they serve. Moreover, the actions that trustees take to comply with their congressionally imposed duty are quite unlike actions taken, not to advance any legislative mandate, but in furtherance of improper personal interests. It is the latter type of action that this Court condemned in the "biased decisionmaker" cases.

B. Multiemployer Pension Plan Trustees Do Not Act As Adjudicative Decisionmakers When They Calculate Withdrawal Liability.

The court of appeals also erred in concluding that the trustees exercise adjudicative or judicial powers when they calculate withdrawal liability assessments. As the First Circuit explained in *Keith Fulton*, 762 F.2d at 1140, "the trustees are simply part of an administrative procedure set up by Congress for reaching an initial determination of withdrawal liability * * * ." Moreover, the trustees "do not have unbridled discretion in fixing the amount of liability. They are required to compute the employer's debt according to 'detailed and explicit statutory guides' " (*id.* at 1141 (citation omitted)). The same points were made in *Dorn's Transp., Inc. v. I.A.M. Nat'l Pension Fund*, 578 F.Supp. 1222, 1237-1238 (D.D.C. 1984), quoted with approval in *Keith Fulton*, 762 F.2d at 1142:

> [T]he role [the trustees] perform in the statutory scheme is one of administration or enforcement rather than of adjudication. Both the fact and the degree of liability are determined by the trustees according to statutorily mandated standards and methods which otherwise satisfy the requirements of due process. * * * In this respect, the precision of the Congressionally-prescribed standards cures the process of the innate taint of partiality.[12]

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[12] In addition to the First Circuit, every other court of appeals that has considered the question presented in this case has recognized that many of the trustees' duties in assessing withdrawal liability are ministerial in nature. See *Bd. of Trustees* v. *Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1403 (9th Cir. 1984), cert. denied, 105 S. Ct. 2116 (1985); *Washington Star Co.* v. *Int'l Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1511 (D.C. Cir. 1984); *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 725 F.2d 843, 855 (2d Cir.), cert. denied *sub nom. Sibley, Lindsay & Curr Co.* v. *Bakery, Confectionery & Tobacco Workers Int'l*, 104 S. Ct. 3554 (1984); *Republic Industries, Inc.* v. *Teamsters Joint Council No. 83*, 718 F.2d 628, 640 n.13 (4th Cir.), cert. denied, 104 S. Ct. 3553 (1984).

Thus, the court of appeals clearly misunderstood the statutory scheme when it ruled that the trustees' role is "adjudicative" because they "perform the judicial task of making *case-by-case determinations* significantly affecting the property of employers" and "must frequently make complex legal and factual determinations" (App. A, *infra*, 26a-27a n.18) (emphasis added)). The court focused on three separate aspects of the withdrawal liability determination—the selection of a method for allocating unfunded vested benefits, the selection of actuarial methods and assumptions, and the application of certain statutory exemptions. In each instance, the court erred in concluding that the trustees exercise such significant discretion that their supposed bias would taint their ultimate determination of an employer's withdrawal liability.

First, multiemployer pension plan trustees do not make "case-by-case" selections of a method for allocating unfunded vested benefits. The MPPAA expressly requires *uniform* application to *all* withdrawing employers of whatever allocation method is used by the plan. 29 U.S.C. 1394(b). Arbitrary and discriminatory actions by plan trustees targeted against a particular employer may be overturned in arbitration notwithstanding the presumption of correctness ordinarily accorded the trustees' determinations. See, *e.g.*, *Dravo Corp. & IAM Nat'l Pension Fund*, 6 Employee Benefits Cas. (BNA) 2641, 2647-2649 (1985) (Mittelman, Arb.).

Furthermore, it seems doubtful that the trustees could be transformed into decisionmakers exercising significant discretionary authority simply because they have the statutory power to adopt plan amendments relating to allocation methods. The selection of an allocation method is not a true "determination" within the meaning of 29 U.S.C. 1401(a)(1). The Act provides that "[a] multiemployer plan * * * *may be amended* to provide that the amount of unfunded vested benefits allocable to an employer that withdraws from the plan is an amount determined under [one of the alternative methods specified in Section 1391(c)]." 29 U.S.C. 1391(c)(1) (emphasis added). The statute places no restrictions on the trustees' freedom to choose from among the alternative allocation methods, except to require that the method selected must be applied uniformly to all employers (29 U.S.C. 1394(b)).[13] Nothing in the Act suggests that an arbitrator has the power to review or overrule the trustees' selection of an allocation method, so long as the trustees' choice is made from among the alternatives specified by Congress. Thus, there should be no occasion for an arbitrator to apply the Act's presumption of correctness to the trustees' chosen allocation method. It is therefore difficult to comprehend how the presumption could ever be the cause of constitutional harm to a withdrawing employer.

Second, trustees neither make "determinations of appropriate discount rates" (App. A, *infra*, 25a-26a) nor decide what other actuarial assumptions to employ.[14] Instead, the plan's actuary selects the assumptions, including the appropriate discount rates, and the Act requires that the assumptions be reasonable and reflect the actuary's best professional judgment concerning the plan's anticipated experience. 29 U.S.C. 1393(a). Because an actuary is not a fiduciary to the plan (29 C.F.R. 2509.-75-5 (Q and A D-1)) and has an express legal obligation to adhere to prescribed ethical standards (20 C.F.R. 901.-20), the delegation of authority to the actuary eliminates even the speculative grounds for impermissible bias relied upon by the court of appeals.

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[13] In addition, it bears noting that if the plan adopts an amendment requiring PBGC approval, the criteria to be considered by the PBGC in determining whether to approve the amendment in no way relate to the interests of employers. The PBGC is permitted to disapprove a plan amendment that adopts a non-statutory allocation method only if it would "significantly increase the risk of loss to plan participants or to the [PBGC]." 29 U.S.C. 1391(c)(5)(A). See also 29 U.S.C. 1400.

[14] With respect to the selection of discount rates, the court of appeals did not rely on any facts in the record of this case, but instead referred to statements in the dissenting opinion in *Keith Fulton*, 762 F.2d at 1150 (Aldrich, J., dissenting). The court below acted on the belief that the trustees in *Keith Fulton* "had selected a discount rate of 7.5% although expert testimony suggested that a rate of 14.5% would have been reasonable" (App. A, *infra*, 26a). Whatever the facts in *Keith Fulton*, there is no "expert testimony" on discount rates, or any other basis in the record in this case, for questioning the reasonableness of the 6%

The calculation of the plan's unfunded vested benefits is directly dependent on the assumptions selected by the actuary. 29 U.S.C. 1393(c). A recent report to Congress makes clear that the trustees must rely heavily on their retained expert actuaries to determine and allocate unfunded vested benefits:

> In estimating the unfunded vested benefits of which an employer withdrawing from a multiemployer pension plan is responsible for an allocated portion, the determination of an appropriate interest rate assumption to be used is complex. The interest rate assumptions should reflect the long-term expectation of rates of return on the investment of plan assets realistically achievable on the types of assets held by the plan and the plan's investment policy. This is necessary because benefits attributable to the plan participants' service, at the time the employer withdraws, will be paid over a long future period, and during this period, the rates of return on investments will fluctuate based on changes in economic conditions. Thus, it is appropriate that the interest rate assumption be determined by the plan actuary who is an expert in the design, financing, and operation of pension plans.
>
> Because of the variable factors involved in making actuarial assumptions, the amount of unfunded vested benefits for withdrawal liability will vary depending on the interest rate assumptions used by the actuary, and the differences can be significant for withdrawing employers and the plan. However, the American Academy of Actuaries, in recommendations for specific standards of practice by its members, recognizes that such differences can occur because actuarial assumptions may be developed which appropriately differ from plan to plan.

Comptroller General of the United States, GAO/HRD-85-16, *Effects of Liabilities Assessed Employers Withdrawing From Multiemployer Pension Plans* 32-33 (1985) [hereinafter cited as *Liabilities Report*]. The *Liabilities Report* further acknowledges that assessments of liability could in some cases be inequitable, but it explains that this is so because the calculations involve "considerable judgment *by the actuary* concerning future uncertainties" (*id.* at 33 (emphasis added)), and it recommends monitoring of withdrawal liability determinations to ascertain whether additional regulation by the PBGC may be necessary.

The *Liabilities Report* also describes the recommendations issued by the American Academy of Actuaries for standards of actuarial practice. *Id.* at 31-32. Those standards recognize that assumptions selected by pension plan actuaries should "reflect expected long-term future trends rather than give undue weight to recent past experiences." *Id.* at 31. Actuaries are advised to take ac-

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interest rate used by the Pension Plan. In fact, that rate is quite common. See page 20 & note 15, *infra*.

This Court has emphasized the need for a specific factual record in analyzing claims that a decisionmaker is unconstitutionally biased. See, *e.g.*, *Schweiker* v. *McClure*, 456 U.S. 188, 196 & n.10 (1982); cf. *Friedman* v. *Rogers*, 440 U.S. 1, 18-19 (1979). Here, the court of appeals' complete failure to identify specific decisions by the trustees demonstrating their supposed bias strongly suggests that the court had none of the kinds of evidence on which this Court has relied in evaluating decisionmaker bias in previous cases.

count of information from accountants and investment managers, "which may result in the development of actuarial assumptions that differ from plan to plan" (*ibid.*). Finally, the Academy explicitly recognizes that actuaries "[m]ay find it desirable to assume a conservative posture in selecting actuarial asumptions" (*id.* at 32).

In this context, it was improper for the court of appeals to seize on the wide range of purportedly reasonable interest rate assumptions relied upon by the dissent in *Keith Fulton*, 762 F.2d at 1150 (Aldrich, J.) (see App. A, *infra*, 18a, 26a), without any basis in the record of this case for doubting the reasonableness of the 6% interest rate assumption used by the Pension Plan to calculate Yahn's withdrawal liability. Had the court inquired into actuarial practices, it would have discovered that a large percentage of actuaries use relatively low interest rate assumptions for calculating unfunded vested benefits and that 6% is a very common rate.[15]

In light of the role played by neutral actuaries, therefore, the court of appeals was wrong to conclude that "the trustees have wide and significant discretion" to determine appropriate discount rates (App. A, *infra*, 25a). Moreover, if the court of appeals' decision stands, the result is almost certain to be a substantial increase in employer challenges to "technical actuarial matters with respect to which there are often several equally 'correct' approaches." *Senate Labor Summary* 21. It was precisely to avoid such "'[l]engthy, futile and costly bickering over the methods chosen'" that Congress enacted the statutory presumption of correctness. *Keith Fulton*, 762

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[15] *Liabilities Report* 25-26. In a sample of 91 pension plans, the *Liabilities Report* found that 80% of the plans used interest rates below 7% and that the most common rate, used by 42% of the sampled plans, was 6%. *Id.* at 26. The *Liabilities Report* did cite trustees' desire to maximize withdrawal liability as one reason for the use of low interest rate assumptions, but numerous other reasons were given to support the same result. *Ibid.*

F.2d at 1143 (quoting *Dorn's Transp., Inc.*, 578 F. Supp. at 1239).

The last area of purported discretionary decisionmaking criticized by the court of appeals was the application of statutory exemptions (App. A, *infra*, 26a). But, as Judge Seitz pointed out in dissent (*id.* at 40a), no challenge to the application of such exemptions was raised below.[16] Even if such a challenge had been properly preserved, the application of many of the statutory exemptions to withdrawal liability is largely a matter of legal interpretation. The PBGC has concluded that the trustees' legal determinations are not entitled to a presumption of correctness in arbitration. Thus, many of the trustees' decisions concerning the applicability of exemptions will be subject to de novo review. See 48 Fed. Reg. 31251, 31253, 31256 (1983) (proposed rule); 50 Fed. Reg. 34679, 34681 (1985), to be codified at 29 C.F.R. 2641.4(a) (final rule).[17]

In sum, the court of appeals plainly erred in its conclusions that the trustees are biased as a matter of law in favor of maximizing withdrawal liability and that they exercise significant discretion in calculating such liability. Neither assumption accords with the realities of multiemployer pension plan administration.

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[16] In its initial request for review of the liability assessment, Yahn did contend, *inter alia*, that it was entitled to have its liability reduced because (1) Yahn allegedly had no liquidation value and had sold all or substantially all of its assets in an arm's length transaction (see 29 U.S.C. 1405(a)) and (2) the buyer of Yahn's assets also hired some of Yahn's employees and made contributions on their behalf to the Pension Plan (see 29 U.S.C. 1384). But these contentions were not pressed in the ensuing litigation. In the court of appeals, for example, Yahn based its due process challenge solely on the actuarial assumptions used by the Pension Plan, which it termed the "crucial and elastic component of the liability calculation" (Br. for Appellants 38; see also *id.* at 39).

[17] Although the discussion of presumptions was removed from the final rule, the preamble states that the rule's silence on presumptions does not reflect any change in the PBGC's position. 50 Fed. Reg. 34681 (1985).

C. The Increased Number And Scope Of Arbitration Proceedings Likely To Result From The Court Of Appeals' Decision Threaten To Drain The Resources Of Multiemployer Pension Plans And The PBGC's Financial Assistance Fund.

The decision of the court of appeals will seriously disrupt the collection of withdrawal liability, with a harmful financial impact on the PBGC and multiemployer plans.[18] Because the court of appeals' ruling requires de novo arbitration proceedings in any case in which an employer disputes its liability, the number and scope of arbitration proceedings can be expected to increase substantially unless the decision is reversed.[19]

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[18] The PBGC has a clear proprietary interest in the timely and efficient collection of withdrawal liability. For example, the Anthracite Health and Welfare Fund, a major multiemployer plan covering Pennsylvania coal miners, has received approximately $2 million in financial assistance from the PBGC under 29 U.S.C. 1431. The PBGC's financial assistance loans to the plan are secured in part by the plan's collections of withdrawal liability. The plan recently recovered several hundred thousand dollars in withdrawal liability from a single employer, resulting in a repayment to the PBGC of over $160,000. Other withdrawals are expected from that plan. De novo arbitration proceedings for every assessment of liability by that plan could significantly increase the plan's costs for collecting liability and, consequently, reduce the repayment of financial assistance loans to the PBGC.

[19] Relying on the decision below, a district court within the Seventh Circuit recently held that the presumptions contained in 29 U.S.C. 1401(a)(3)(A) and (B) are invalid. *Robbins* v. *The Pepsi-Cola Metropolitan Bottling Co.*, No. 84 C 170 (N.D. Ill. May 8, 1986). The same issue has been raised in a complaint recently filed by The Flying Tiger Line, Inc. and its subsidiaries against a defendant class of some 55 separate multiemployer pension plans. *The Flying Tiger Line, Inc., et al.* v. *Central States, Southeast & Southwest Areas Pension Fund, et al.*, Civ. No. 86-304 (D. Del. filed July 3, 1986). Presumably, the Delaware district court will be bound

As of 1982, there were approximately 2,500 defined benefit multiemployer plans in existence, covering more than 8.7 million participants.[20] A report to Congress analyzing a small sample of these plans found that thousands of employer withdrawals occurred in a period of less than four years. *Liabilities Report* 42 (reviewing 2,868 withdrawals). If de novo arbitration proceedings were required for even a few hundred of these withdrawals annually, the administrative burden on multiemployer plans could be immense. And if the plans were required to pay half of the arbitration costs, those costs alone would cause a significant drain of assets from plans already in financial difficulty.

As the First Circuit recognized in *Keith Fulton*, 762 F.2d at 1144-1145, the consequences of the Third Circuit's decision are directly contrary to congressional intent:

> It is * * * instructive to consider the impact of a decision for [the employer]. Without the presumption in favor of the trustees' determination, results in arbitration are likely to vary for withdrawals even in the same year from a given plan, undermining Congress' evident intent that plan rules be administered uniformly with respect to each employer. 29 U.S.C. § 1394(b). Elimination of the presumption will also lead to an increase in litigation over the withdrawal liability assessments, even in cases where the amount apparently is correct but the employer hopes it can slip a marginal case for another amount past a sympathetic arbitrator.

Nothing in the Due Process Clause requires these results, and the court of appeals erred in holding otherwise.

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to follow the decision of the court of appeals in this case, thus enabling the *Flying Tiger* plaintiffs to subject all members of the defendant class (if certified) to de novo arbitration proceedings.

[20] Comptroller General of the United States, GAO/HRD-85-58, *Effects of the 1980 Multiemployer Pension Plan Amendments Act on Plan Participants' Benefits* 1 (1985).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

EDWARD R. MACKIEWICZ *
General Counsel

MITCHELL L. STRICKLER
Deputy General Counsel

PETER H. GOULD
Deputy Assistant General Counsel

DAVID F. POWER
Attorney

Pension Benefit Guaranty Corporation
2020 K Street, N.W.
Washington, D.C. 20006
(202) 956-5020

* *Counsel of Record*

Of Counsel:

KENNETH S. GELLER
KATHRYN A. OBERLY
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

AUGUST 1986

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 85-1035 & 85-1065

United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan and Robert E. Zimmer, Michael Paolella, John P. Morris and James Smith, Jr., Trustees of the United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan,

Appellees/Cross-Appellants

v.

Yahn & McDonnell, Inc. and
The Pennstar Company,

Appellants in 85-1035/
Cross-Appellees

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

(D.C. Civil No. 83-1690)

Argued September 12, 1985

Before: SEITZ and BECKER, *Circuit Judges*,
and ROSENN, *Senior Circuit Judge*

(Filed MARCH 31, 1986)

Paula R. Markowitz (Argued)
Richard H. Markowitz
Markowitz & Richman
121 South Broad Street, 11th Floor
Philadelphia, PA 19107
Attorneys for Appellees/ Cross-Appellants

William H. Ewing (Argued)
Hangley, Connolly, Epstein, Chicco Foxman & Ewing
1429 Walnut Street, 14th Floor
Philadelphia, PA 19107
Attorneys for Appellants in No. 85-1035/Cross-Appellees

OPINION OF THE COURT

BECKER, *Circuit Judge.*

This case presents three important questions concerning the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381 *et seq.* (1982): 1) whether MPPAA authorizes a right of action to collect withdrawal liability payments pending arbitration proceedings at which employers withdrawing from the plan may challenge assessments of withdrawal liability made by plan trustees; 2) whether the statutory scheme, under which the determination of withdrawal liability is made by trustees who themselves owe a fiduciary duty to the plan, and whose findings must be presumed correct by the arbitrator, deprives withdrawing employers of an impartial tribunal in violation of their procedural due process rights under the Fifth Amendment (and whether the alleged offending provisions are severable from the statutory scheme); and 3) whether MPPAA makes an award of attorney's fees, liquidated damages and costs mandatory upon an entry of a judgment for delinquent payments in favor of a pension plan, even though arbitration and review of arbitration in the district court have yet to take place. The district court held that withdrawal liability may be pursued in court prior to arbitration; that MPPAA comports with the constitutional requirement of due process; and that it would be premature to award a pension plan attorney's fees, liquidated damages and costs prior to the final resolution of the controversy.

We agree with the district court that MPPAA provides for a cause of action to collect withdrawal liability pending arbitration. We find, however, that the scheme violates the due process rights of withdrawing employers. We further find that the scheme is severable, and accordingly strike down only the portion of the scheme that requires the arbitrator to accord the trustees' determination of withdrawal liability a presumption of correctness. Finally, we hold that once the district court granted judgment for delinquent payments in favor of the pension plan, it was required to award attorney's fees, liquidated damages and costs even though the matter had yet to go to arbitration. Accordingly, we affirm in part and reverse in part.

Because of MPPAA's complexity, we must commence our analysis with a rather detailed description of its historical background and statutory scheme.

I. *HISTORICAL BACKGROUND & STATUTORY SCHEME*

Under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* (1976), *amended by* 29 U.S.C. § 1301 *et seq.* (1982), employers contribute to a pension plan on behalf of each of their employees who is a member of a participating union. The amount of the payments is determined by a collective bargaining agreement between each employer and its employees. The plan is administered by trustees, half of whom are chosen by contributing employers and half by the union. 29 U.S.C. § 186(c)(5)(B). The trustees set the level of benefits paid to participants and determine investment policy. ERISA also established the Pension Benefit Guaranty Corporation ("PBGC"), a government corporation, to insure employees' benefits against a plan's termination for insufficient funds.

Prior to MPPAA, 29 U.S.C. § 1381 *et seq.* (1982), an employer who withdrew from a pension plan incurred a contingent liability: if a multi-employer plan terminated within five years following an employer's withdrawal, the employer was liable to the PBGC, but if the plan did not terminate within five years, the employer had no liability. The maximum of each employer's liability was 30% of its net worth. Because an employer who withdrew from a plan more than five years prior to its termination escaped with no liability, the remaining employers bore a greater share of liability. There was thus an incentive for employers to withdraw from plans in order to avoid future liability. Many withdrawals resulted, and the solvency of pension plans was threatened.

In 1980, Congress passed MPPAA, amending ERISA, to discourage withdrawals from multiemployer pension plans and to ensure the solvency of such plans. H.R. Rep. No. 869, 96th Cong. 2d Sess. 67, *reprinted in* 1980 U.S. Code Cong. & Ad. News. 2935. MPPAA, *inter alia*, imposed mandatory liability on withdrawing employers regardless of whether the plan terminated, and repealed the provision that set 30% of an employer's net worth as its maximum liability. Because MPPAA was signed into law on September 26, 1980, but imposed retroactive liability on employers who ceased contributing to a plan on or after April 29, 1980, in a worst case scenario an employer could be liable for all of its assets even if the plan remained solvent and even if the employer had left the pension plan prior to the enactment of MPPAA.[1]

Title 29, § 1381 provides that upon an employer's withdrawal from a pension plan, the plan's trustees determine the amount of liability. In determining the amount of liability, the trustees are required to use one of several actuarial methods set forth in § 1391 or any alternative method approved by the PBGC. 29 U.S.C. § 1391(c)(1) (1982). Section 1394(a) prohibits the retroactive application of a method chosen after the date of the employer's withdrawal and Section 1394(b) requires that the selected method be applied uniformly to all employers who withdraw from the plan.

Once an employer's withdrawal liability is calculated, the plan is required to notify the employer and demand payment on an installment schedule. 29 U.S.C. § 1399 (b)(1). After the employer receives notice of the amount of his withdrawal liability, he may, within ninety days, ask for a review by the plan's trustees. 29 U.S.C. 1399 (b)(2)(A). After a "reasonable review," the trustees must notify the employer of their determination. 29

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[1] The combination of the repeal of the 30% maximum liability, the mandatory nature of liability, and the retroactive application of the scheme has been conceded, even by courts which have upheld the constitutionality of MPPAA, to impose a great hardship on withdrawing employers. *See, e.g.*, Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, Inc., 762 F.2d 1137 (1st Cir. 1985). In his dissent in *Keith Fulton*, Judge Aldrich dramatically described the "stacked deck" which MPPAA dealt withdrawing employers:

> "[H]e finds himself, without possibility of relief, in a boxing ring from which he had been told he might be exempt, the prize being his own money, in an uneven match, but assured by the referee that he would see to it that it was a fair fight. Although not put in exactly those terms, the justification offered for this is that it was his own fault for associating with people like that, and his opponent needs the money."

Id. at 1146.

U.S.C. 1399(b)(2)(B). If a dispute persists, either party may initiate arbitration proceedings, in which the trustees' determination is presumed correct unless the party contesting it shows "by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A). Section 1401(c) provides that the arbitrator's decision is subject to review in a district court where there is also a presumption, rebuttable by a clear preponderance of the evidence, that the arbitrator's factual findings are correct.

Under §§ 1399(c)(2) and 1401, the employer must commence payments within 60 days of being informed of its liability, regardless of whether a review has been requested or arbitration proceedings initiated. Under § 1132(g), if the plan wins judgment for a delinquent payment, attorney's fees and other costs must be paid by the employer.

II. *FACTUAL AND PROCEDURAL HISTORY*

In December 1980, appellant Yahn & McDonnell, Inc. ("Yahn") and Teamsters Union Local No. 115 entered into a collective bargaining agreement requiring Yahn to make specified weekly contributions to the union's ERISA pension plan, Teamsters Union Local No. 115 Pension Plan ("the Plan"), appellees in this action, on behalf of all of Yahn's employees who were members of Local 115. Yahn made all plan contributions expressly required by the collective bargaining agreement. The agreement itself does not provide for the imposition of withdrawal liability. The pension plan was administered by four trustees, two appointed by Local 115 and two appointed by contributing employers.

In November 1981, Yahn ceased operations and withdrew from the pension plan. In April 1982, the Plan demanded withdrawal liability totalling almost $458,000, and informed Yahn that the Plan had the right to look

to a parent company for payment if Yahn could not pay.[3] In July, Yahn requested a review, raising several issues, *e.g.*, whether Yahn's liability might be reduced by its poor financial condition and/or the fact that most of its employees who were members of Local 115 had been hired by another company which had contributed and was continuing to contribute to the pension plan. After conducting the review, the trustees notified Yahn that its assessment would not be altered. On January 31, 1983, the Plan informed Yahn that if Yahn failed to make liability payments, the Plan would file suit within 60 days. Yahn demanded arbitration and informed the Plan of its intention to challenge the constitutionality of MPPAA in district court. The parties agreed to hold arbitration in abeyance pending resolution of the constitutional issues. In April 1983, the Plan brought suit in the district court for the Eastern District of Pennsylvania against Yahn seeking a withdrawal liability payment.

In the district court Yahn argued that MPPAA does not confer a right of action to collect withdrawal liability payments while arbitration is pending. Yahn also argued that MPPAA denied it due process because the initial determination of liability is made by biased trustees. Yahn maintained that the right of appeal to an arbitrator and a district court did not eliminate the bias because the trustees' determination is presumed to be correct under the Act and must be reviewed deferentially in arbitration and in the district court. Additionally, Yahn filed a counterclaim alleging that the trustees, by pledging benefits that were not fully funded, had been negligent in their management of the pension fund.

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[3] Section 1301(b) makes companies under common control jointly and severally liable for one another's debts. Yahn's parent company Pennstar is also an appellant. All references herein to "Yahn" refer to both Yahn and Pennstar.

After considering the submissions of the parties, the district court filed a memorandum and order in which it: 1) granted summary judgment against Yahn; 2) held that MPPAA does not violate procedural due process; 3) denied the Plan's request for attorney's fees, liquidated damages and costs; and 4) dismissed Yahn's counterclaim, noting that it would be resolved at arbitration. Shortly thereafter it entered judgment against Yahn in the sum of $258,000. Yahn has appealed the district court's judgment with respect to withdrawal liability and the constitutionality of MPPAA.[3] The Plan has cross-appealed, alleging that the district court erred in denying it attorney's fees, costs, and liquidated damages.[4]

III. *PROPRIETY OF A CAUSE OF ACTION PENDING ARBITRATION*

We turn first to the question whether MPPAA authorizes a right of action to collect withdrawal liability payments pending arbitration. The statutory scheme is unclear on this point. *See Republic Industries v. Teamsters Joint Council No. 83*, 718 F.2d 628, 641-42 n.16 (4th Cir. 1983). Several provisions strongly suggest that there is such a cause of action. Section 1399(c)(2) says "Withdrawal liability shall be payable in accordance with the schedule set forth by the plan . . . no later than 60 days after the date of the demand notwithstanding any request for review or appeal . . . ." Section 1401(d) is perhaps even more to the point.

> *Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision* with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination.

(emphasis added). These sections explicitly provide for payments pending the arbitrator's decision, and would appear meaningless if there were no cause of action to enforce them.[5] Indeed, § 1451(a)(1) establishes such a cause of action, saying that "[A] plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party . . . may bring an action for appropriate legal or equitable relief, or both."

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[3] In addition to disagreeing with the district court's legal determinations about withdrawal liability, Yahn argues that the grant of summary judgment was inappropriate in the face of allegedly disputed factual matters. We find this claim without merit.

Yahn argued in the district court that its parent company and co-appellant Pennstar was not directly notified about its liability, and therefore cannot be liable for withdrawal liability payments. Yahn contends on appeal that summary judgment should not have been granted in light of the factual dispute concerning the adequacy of the notice given Pennstar. However, the demand letter sent to Yahn's attorney, who is also Pennstar's attorney, specifically warned that the Plan reserved the right to look to a parent company for payment. Moreover, Yahn and Pennstar have the same President. Indeed, Yahn does not assert that Pennstar lacked knowledge about the determination of its liability. There is no question of fact as to what notice Pennstar received, only the question of law as to the adequacy of such notice under § 1399. The PBGC has stated that notice of one company suffices as notice to a commonly controlled company. 49 Fed. Reg. 22,644 (1984). We agree. Thus the dispute concerning notice did not afford a basis for the district court not to grant summary judgment.

Yahn also claims that there was a material factual dispute concerning whether the plan gave Yahn's requested review "reasonable" consideration as required by § 1399(c)(2), and that, in the wake of this factual dispute, summary judgment was inappropriate. While there was an issue of fact as to the adequacy of the Plan's review, it was not material to the issue before the district court concerning Yahn's obligation to make withdrawal liability payments pending arbitration. The adequacy of the Plan's review is a question appropriate for arbitration. Under our holding in Part III, however, Yahn was obligated to make withdrawal liability payments pending arbitration. *See infra* pp. 10-14.

We also find without merit Yahn's argument that the district court improperly dismissed its counterclaim.

[4] The appeals, timely filed, are before us under 28 U.S.C. § 1291.

[5] Additionally, the reference in § 1399(c) to overpayments and underpayments would seem gratuitous if no payments had to be made until after arbitration.

Yahn argues that these provisions establish retroactive payments plus interest in the event that the arbitrator affirms a finding of liability, and that pension plans, therefore, are not "adversely affected" within the meaning of § 1451 until after the arbitrator's decision. This position requires downplaying a plan's cash/flow problems. In *Pantry Pride v. Retail Clerks Tri-State Pension Fund*, 747 F.2d 169, 171 (3d Cir. 1984), we emphasized Congress' concern with an uninterrupted flow of pension payments, and implicitly recognized that there is a cause of action to collect interim liability pending arbitration. In that case, an employer filed suit challenging the assessment of withdrawal liability, and the plan moved for withdrawal payments during litigation. The district court limited payments to an amount less than the schedule set forth by the plan trustees. On appeal we were faced with the threshold question whether that holding was appealable as an interlocutory order. We said:

> [T]he denial of the claim to interim withdrawal benefits is a serious one. Congress believed that it was important to insure that the flow of employer withdrawal liability payments was not delayed by an employer disputing liability . . . . If no interlocutory review were possible, the Fund could effectively lose *its statutory protection against interruptions in the pre-arbitration flow of contributions that Congress mandated through the interim liability provisions.*

Id. at 171 (emphasis added).

Because the pension plan had not filed a counterclaim, we held that the district court should not have addressed the question of interim liability payments at all. However, as the quoted passage makes clear, we implicitly recognized that there is a cause of action to collect withdrawal liability pending arbitration (Judge Hunter went further, dissenting on the grounds that MPPAA made it mandatory upon the court to order withdrawal liability payments notwithstanding deficiency in the plan's pleadings). The courts which have considered this question directly have reached the same conclusion. *See Trustees of the Retirement Fund of the Fur Manufacturing Industry v. Lazar-Wisotzky, Inc.*, 550 F.Supp. 35 (S.D.N.Y. 1982), *aff'd without opinion*, 738 F.2d 419 (2d Cir. 1984); *Commisison Drivers Local 187 Pension Fund v. Hertz Corp.*, 3 EBC 1801 (E.D.Pa. 1982).

On the other hand, there is strong language in the statutory scheme contradicting the apparent implication of §§ 1399(c), 1401(d) and 1451 that there is a cause of action to collect withdrawal liability payments pending arbitration. Specifically, § 1401(b) provides:

> 1) *If no arbitration proceeding has been initiated* pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399 (b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. *The plan sponsor may bring an action in a State or Federal court* of competent jurisdiction for collection.
>
> 2) Upon completion of the arbitration proceedings . . . any party thereto may bring an action . . . to enforce, vacate or modify the arbitrator's award . . . .

(emphasis added).

By explicitly conferring a right of action to collect payments only "If no arbitration proceeding has been initiated," and "Upon completion of the arbitration proceedings," Section 1401(b) can be read to imply that no such right of action exists prior to arbitration.[6]

While the conflicting provisions within MPPAA render this question difficult, we have found strong authority for the proposition that there is a cause of action to collect withdrawal liability payments pending arbitration. In addition to the courts in *Pantry Pride*, *Hertz* and *Lazar-Wisotzky*, the PBGC, while acknowledging the lack of clarity on this point in the statutory scheme, has stated its view that there exists a right of action to collect payments pending arbitration. 49 Fed. Reg. 22,644 (1984). In light of Congress' obvious desire to ensure the solvency and stability of pension plans, *see supra* p.5, we believe this statutory interpretation is correct. Accordingly, we will affirm the district court's grant of summary judgment for the Plan with respect to an interim liability payment. However, we hope that Congress will soon clarify the confusion resulting from conflicting provisions within MPPAA.[7]

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[6] Yahn also cites regulation 29 C.F.R. § 2644.2(c)(1) (1985), which provides that "a default as the result of failure to make any payments shall not occur until the 61st day after . . . the issuance of the arbitrator's decision." The Plan argues persuasively, however, that the default referred to is only a "default which triggers the acceleration of the total amount of outstanding liability." (Appellee's brief at 17). Indeed, in § 1399(c)(5), a "default" justifies a demand for immediate total payment. In its supplementary comments to the regulations, the PBGC defines default in a manner entirely consistent with the Plan's interpretation of the regulation. 49 Fed. Reg. 22,643 (1984). Moreover, Yahn's reading of 29 C.F.R. § 2644.2(c)(1) is implausible given Section 2644.2(c)(3), which discusses the post-arbitration refund of "overpayments." It is difficult to see how overpayments would ever occur if employers did not have to make any payments pending arbitration.

[7] To this end, we will send a copy of this opinion, with a cover letter calling attention to this point, to the Solicitor of the United States Department of Labor and the ranking majority and minority members on the House and Senate Labor Committees.

IV. *ATTORNEY'S FEES, LIQUIDATED DAMAGES, AND COSTS*

After granting summary judgment for the Plan with respect to Yahn's withdrawal liability, the district court considered the Plan's application for attorney's fees, liquidated damages and costs, and determined that an award on such matters would be premature because arbitration had yet to take place. The Plan asserts that the district court erred because MPPAA compels the award of attorney's fees, liquidated damages and costs upon a judgment in favor of a pension plan for delinquent payments.

Section 1451(b) provides that failure to make withdrawal liability payments shall be treated as delinquency in contribution within the meaning of § 1145. Thus, the Plan's suit in district court was an action to enforce a delinquent contribution under § 1145. Section 1132(g)(2) provides:

> In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court *shall* award the plan
>
> (C) an amount equal to the greater of—
>
> . . .
>
> (ii) liquidated damages . . .
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant
>
> . . . .

(emphasis added). The language of this section is mandatory. The fact that it amended a section that gave the judge discretion to award such fees buttresses the conclusion that § 1132 made attorney's fees, costs and liquidated damages mandatory upon a judgment in favor of the plan. Moreover, Section 1132(g)(1) states that in any action by a participant, beneficiary or fiduciary of a plan *other* than an action to recover a delinquent payment, an award of attorney's fees and costs is discretionary with the judge. This section implies that in the case of an action to recover a delinquent payment, an award of fees and costs is mandatory.

Because of the clear language of the statute, we join the Second, Fifth and Ninth Circuits in holding that in successful actions for delinquent payments, "attorney's fees are no longer discretionary." *Operating Engineers Pension Trust v. Reed*, 726 F.2d 513, 514 (9th Cir. 1984). *Accord O'Hare v. General Marine Transport Corp.*, 740 F.2d 160, 171 (2d Cir. 1984); *Carpenters Amended and Restated Health Benefit Fund v. John W. Ryan Construction Co., Inc.*, No. 84-5001, slip op. (5th Cir. Aug. 12, 1985).[8] Nor was there any basis for the district court to defer these awards until after arbitration or review in the district court. As we have noted, the award of costs and attorney's fees is related only to the judgment for delinquent payments. Having already entered that judgment, the district court had at its disposal all of the material relevant to a determination of costs and attorney's fees.

Furthermore, while the arbitrator could find that Yahn should not have been assessed withdrawal liability by the trustees (or should have been assessed a lesser amount of liability) and thus order a refund, the arbitrator cannot overturn the district court's finding that Yahn was obligated to make payments pending the arbitrator's decision. *See* Part III *infra*.

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[8] We disagree with the Plan's contention that this court had already decided this issue in Teamsters Pension Trust Fund of Philadelphia and Vicinity v. John Tinney Delivery Service, 732 F.2d 319 (3d Cir. 1984). In *Tinney* we held that the district court mistakenly ignored the remedies made available by § 1145, but we did not decide whether those remedies were mandatory.

V. *THE PROCEDURAL DUE PROCESS CHALLENGE*

A. *Background; The Keith Fulton Case*

The constitutional question before us is whether the MPPAA denies procedural due process to withdrawing employers; more specifically, whether the determination of liability by trustees who owe a fiduciary duty to the plan and thus are putatively predisposed to impose excessive liability on withdrawing employers, coupled with the presumption in favor of that determination in arbitration and the further deference given the arbitrator's decision in district court,[9] results in the denial of due process to withdrawing employers.

The provisions of MPPAA have given rise to many other constitutional challenges, which the Supreme Court and this court have resolved in favor of constitutionality.[10]

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[9] Most statutory schemes providing for arbitration require reviewing courts to defer to arbitrator's findings, and this is not in itself problematic. In MPPAA, however, this practice is said to perpetuate the insulation of the trustees' putatively biased determination from effective review. We note that § 1401(c) requires the district court to presume the arbitrator's findings of fact correct, and makes no mention of the scope of review of legal determinations. In light of this court's settled policy of extreme deference to an arbitrator's legal as well as factual determinations, *see, e.g.*, United Steelworkers of America, District 36 v. Adbill Management Corp., 754 F.2d 138 (3d Cir. 1985), we do not read this omission as suggesting that the district court has plenary review over the arbitrator's findings of law. In any event, the trustees' factual determinations and discretionary judgments, which must indisputably be reviewed deferentially in both arbitration and the district court, are critical to assessments of withdrawal liability.

[10] In Pension Benefit Guaranty Corp. v. R.A. Gray & Co., —— U.S. ——, 104 S.Ct. 2709 (1984), the Supreme Court upheld the constitutionality of retroactive application of the statute and in Connolly v. Pension Benefit Guaranty Corporation, 54 U.S.L.W. 4208 (1986), the Court determined that MPPAA did not violate the takings clause. In Terson Company, Inc. v. Bakery Drivers and Salesman Local 194, 739 F.2d 118 (3d Cir. 1984), this court upheld

Neither this court nor the Supreme Court, however, has addressed the procedural due process rights of withdrawing employers, the question with which we are squarely confronted here.

This question has been considered by five circuits, all of which have upheld the constitutionality of MPPAA. *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 854-55 (2d Cir. 1984); *Washington Star Co. v. Int'l Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1511 (D.C. Cir. 1984); *Republic Industries, Inc. v. Teamsters Joint Council No. 83*, 718 F.2d 628, 639-42 (4th Cir. 1983); *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc.*, 749 F.2d 1396, 1403-04 (9th Cir. 1984); *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund*, 762 F.2d 1137 (1st Cir. 1985) (*en banc*).[11] We do not lightly find a constitutional deficiency in a statutory scheme that has been upheld by five circuits. Our diffidence is diminished, however, by the fact that all but one of these cases have dealt with the procedural due process challenge to MPPAA only in passing, in cases dominated by other claims. The important exception is the First Circuit's *Keith Fulton*, in which Judge Coffin's majority opinion and Judge Aldrich's dissent thoughtfully and comprehensively set forth the opposing positions.[12] It is useful to commence our analysis with a summary of their respective arguments.

MPPAA against the contentions that it violated substantive due process and the right to trial by jury and that it was unconstitutionally vague.

[11] The First Circuit case was decided *en banc*, after a panel in First Circuit had held MPPAA unconstitutional. The vacated panel decision was also published in the bound 762 F.2d 1124 (1st Cir. 1984).

[12] The majority opinion was joined by Chief Judge Campbell, Judge Bownes and Judge Breyer. Judge Torruella joined the dissent.

Judge Coffin began his analysis by invoking the doctrine of *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), that legislative acts adjusting the burdens and benefits of economic life survive constitutional scrutiny unless they are arbitrary or irrational. *Keith Fulton*, 762 F.2d at 1140. He proceeded to explain why the procedures established for determining withdrawal liability are not unreasonable. First, he argued that because Congress has set forth the actuarial methods to be used by plan trustees, and because the method adopted must be uniformly applied to withdrawing employers, the trustees' discretion is significantly cabined. *Id.* at 1141. Second, he disputed that the trustees are unduly biased against withdrawing employers. *Id.* at 1142-43. He noted first that half of the trustees are selected by contributing employers and would thus be sympathetic to withdrawing employers. He argued further that trustees will recognize that excessive assessments of withdrawal liability would discourage employers from joining the plan in the future. He argued, too, that because Congress indisputably could have mandated that the harshest method for computing liability be used for all withdrawing employers, permitting the trustees to choose among that alternative and less harsh methods cannot violate due process. *Id.* at 1144.

Judge Coffin viewed the presumptions in favor of the trustees' determination as reasonably calculated to discourage litigation and produce uniformity. *Id.* at 1143-44. He implicitly argued that Congress had made a legitimate tradeoff between efficiency and fairness, promoting the former at the expense of the latter. Judge Coffin concluded that Congress took measures to address a growing problem, that these measures were reasonably related to Congress' important goals, and that while some unfairness may have resulted, it did not rise to the level of a constitutional violation. *Id.* at 1146.

Judge Aldrich took issue with each of these points. He disagreed with the claim that the trustees do not have significant discretion, emphasizing their freedom to choose the discount rate (for determining future values) with which each withdrawing employer's liability is calculated. *Id.* at 1149. The discount rate, of course, has serious financial ramifications. Judge Aldrich noted that, in the case before them, the trustees had selected a discount rate of 7.5 per cent while the fund's actuary admitted that 14.5 per cent would have been equally reasonable. *Id.* at 1150.

He also strongly disputed the notion that the trustees are not overly biased, pointing out that all of the trustees, including those selected by employers, legally owe a fiduciary duty to the fund. *Id.* at 1148. Whereas Judge Coffin viewed the presumption of correctness accorded the trustees' determination as a legitimate, efficiency-promoting device, Judge Aldrich viewed it as perpetuating the problem of bias by insulating the trustees' tainted finding from necessary scrutiny. *Id.* at 1151.

Judge Aldrich dismissed as irrelevant the fact that Congress could have chosen to apply the harshest method to all withdrawing employers, because the issue is the fairness of the *process*, not the reasonableness of the result. *Id.* He concluded with a flourish that the withdrawing employers participate in an event where "the referee has been fixed." *Id.*

While we believe that some of the *Keith Fulton* majority's arguments are strong, for the reasons that follow we are persuaded that Judge Aldrich's analysis is closer to the mark.

B. *The Appropriate Inquiry*

We note at the outset our view that the majority in *Keith Fulton* blurred the critical distinction between substantive due process and procedural due process. It repeatedly invoked *Turner Elkhorn* in support of some variation on the theme that as long as Congress acts reasonably, the due process requirement is met. *Turner Elkhorn* and its progeny, however, deal with substantive due process challenges, not procedural due process. They stand for the proposition that Congress cannot irrationally or arbitrarily rearrange economic benefits and costs. A procedural due process challenge, however, concerns the adequacy and fairness of the mandated procedures. *Schweiker v. McClure*, 456 U.S. 188 (1982); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

The district court in the case at bar did not confuse substantive and procedural due process but made an equally significant error by failing to distinguish between two kinds of procedural due process violations: those that arise from insufficient procedural safeguards and those that arise from decisionmaker bias. It is well established that procedures that insufficiently protect against error may violate due process. *See Mathews*, *supra*. In addition, it is well-settled that "due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities." *McClure*, 456 U.S. at 195.

These two sources of procedural due process violations have given rise to two separate branches of jurisprudence. The appropriate analysis for cases involving allegations of procedures that inadequately guard against error is the balancing test set forth in *Mathews*. This test requires the court to balance the risk of an erroneous deprivation, the weight of the individual's interest, and the burden on the state of imposing additional safeguards. 424 U.S. at 335.

A *Mathews* balancing test, however, is not the appropriate inquiry when the due process claim involves an allegation of biased decisionmakers. *Mathews* involved only allegations of insufficient procedural safeguards, not allegations of a biased decisionmaker. The *Mathews* Court made no comment on the line of cases that indisputably establish the right to an impartial tribunal. *See Gibson v. Berryhill*, 411 U.S. 564 (1973) (optometrist disciplined by Alabama Board of Optometrists was denied right to an impartial hearing when members of Board had pecuniary interest in outcome); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (individual convicted of traffic violation was denied impartial hearing when Mayor sat as judge); *See also Withrow v. Larkin*, 421 U.S. 35 (1975); *In Re Murchison*, 349 U.S. 133 (1955); *Tumey v. State Of Ohio*, 273 U.S. 510 (1927). Indeed, since *Mathews*, the Supreme Court has had several occasions to consider claims of due process violations based on allegations of a biased decisionmaker; in none of these cases has the Court resorted to the *Mathews* balancing test to resolve that issue. *Schweiker v. McClure*, 456 U.S. 188 (1982); *Marshall v. Jerrico*, 446 U.S. 238 (1980); *Friedman v. Rogers*, 440 U.S. 1 (1979).[10]

If the only problem with biased decisionmakers was the likelihood of error, it would make sense to apply the *Mathews* balancing test in cases involving allegations of biased decisionmakers and to subsume the problem of bias under the "risk of erroneous deprivation" prong of the three-part test. However, the requirement of an impartial decisionmaker transcends concern for diminishing the likelihood of error. The unfairness that results from impartial decisionmakers strikes so deeply at our sense of justice that it differs qualitatively from the injury that results from insufficient procedures. In Justice Holmes' famous phrase, "even a dog distinguishes between being stumbled over and being kicked." O. Holmes, *The Common Law* 3 (1881).

In the case at bar, Yahn challenges primarily the impartiality of the tribunal. Therefore, following Supreme Court jurisprudence, the *Mathews* balancing test is not the primary inquiry. If someone is deprived of his right to an impartial tribunal, then he is denied his constitu-

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[10] Significantly, in *McClure* the plaintiff alleged both that the procedures were generally insufficient and that there was a biased decisionmaker. The Court applied the *Mathews* test to the question of sufficiency of procedures, but conspicuously avoided using the test to determine whether plaintiff's right to an impartial hearing was violated.

tional right to due process, regardless of the magnitude of the individual and state interest at stake, the risk of error and the likely value of additional safeguards (the factors to be balanced under *Mathews*). Since the district court erred by dealing with Yahn's due process claim by applying a *Mathews* test, we turn our attention to Yahn's claim that it was deprived of its right to an impartial decisionmaker.

C. *The Right To An Impartial Decisionmaker*

Our inquiry is twofold: 1) whether there is a sufficient showing of trustee bias; and 2) whether the fact that the trustees do not have wide discretion and/or the availability of an arbitrator's review suffice to eliminate the bias and thus provide due process even if the trustees are biased.

1. *Trustee Bias*

Although there is a presumption that decisionmakers are unbiased, that presumption can be rebutted by a "showing of conflict of interest or some other specific reason." *McClure*, 456 U.S. at 195. There is powerful evidence that the trustees have a significant conflict of interest: as fiduciaries of the plan, trustees have a natural inclination and may even consider it a duty to maximize the fund by extracting as much money as possible from withdrawing employers. Absent countervailing factors, this "possible temptation," *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972), and incentive to maximize withdrawal liability of employers results in the denial of withdrawing employers' due process right to an impartial decisionmaker.

Some courts have countered that while the trustees appointed by the union may be biased against withdrawing employers, the trustees selected by contributing employers will feel an allegiance to withdrawing employers which will counteract the bias of the other trustees. *Keith Fulton*, 762 F.2d at 1142; *Republic Industries*, 715

F.2d at 640.[14] We must reject this argument, because all of the trustees, including those selected by employers, are fiduciaries of the fund, 29 U.S.C. § 1002(21)(a), and thus owe an *exclusive* duty to the fund. 29 U.S.C. § 1104. The Supreme Court has emphatically rejected the suggestion that trustees selected by contributing employers have any loyalty except to the fund:

> [A]lthough § 302(c)(5)(B) requires an equal balance between trustees appointed by the union and those appointed by the employer, nothing in the language of § 302(c)(5) reveals any congressional intent that a trustee should or may administer a trust fund in the interest of the party that appointed him, or that an employer may direct or supervise the decisions of a trustee he has appointed.

NLRB v. Amax Coal, 453 U.S. 322, 330 (1981). Indeed, under § 1109, the trustees are potentially personally liable to the fund. *See Massachusetts Mutual Life Insurance Company v. Russell*, —— U.S. ——, 105 S.Ct. 3085 (1985). Under these circumstances, their conflict of interest is at least as great and arguably greater than the Mayor in the *Ward* case who was deemed unsuited

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[14] In his dissent in *Keith Fulton*, Judge Aldrich made the point that the trustees selected by contributing employers would also be biased against withdrawing employers because of their allegiance to their personal employer: they would seek to maximize the Plan funds so as to increase the plan's solvency and protect their personal employer from greater liability in the event of a future withdrawal. 762 F.2d at 1148. Judge Coffin rejoined that, if the employer-selected trustees were anticipating their personal employer's withdrawal, they would avoid an excessive assessment against other withdrawing employers for fear of establishing a precedent that would adversely affect their own employer when it withdrew. We do not choose between the majority's and Judge Aldrich's accounts of the likely strategy of the trustees appointed by the employers. These speculations are too remote to be dispositive, especially in light of the clear duty all trustees owe the fund. *See infra* at pp. 25-26.

to preside over a traffic violation case because of his interest in maximizing the municipal budget.

It is conceivable that despite their exclusive loyalty to the fund, the trustees will be led by self-interest to refrain from unfairly maximizing assessments of withdrawal liability. As the *Keith Fulton* court suggested, the trustees are aware that "excessively high withdrawal liabilities. . . . would have the effect of discouraging future participation." 762 F.2d at 1142-43. However, this possibility does not mean the trustees are less biased, only that their manifest bias will not always result in gross injustice to employers. We agree with Judge Aldrich:

> It seems an odd principle to determine the permissibility of manifest bias by weighing the decisionmaker's conflicting interests in the scale of justice and finding which side predominates.

Keith Fulton, 762 F.2d at 1149-1150. The due process right to an unbiased decisionmaker is not satisfied by speculation that countervailing concerns may restrain clearly biased parties from excessively harsh judgments.[15]

Even in cases in which the Supreme Court has rejected allegations of decisionmaker bias, its language strongly suggests that it would regard the Plan trustees as biased. In *Friedman v. Rogers*, 440 U.S. 1 (1979), the Court rejected an optometrist's claim that the Texas Optometry Disciplining Board was biased, because he failed to show "the possibility that the members of the regulatory board might have personal interests that precluded a fair and impartial hearing . . . ." *Id.* at 18. The Court endorsed the holding in *Gibson v. Berryhill*, 411 U.S. 578 (1973) where a conflict of interest had been shown and the Court had found a denial of due process

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[15] This is especially true because an impartial hearing preserves the appearance of fairness as well as guarding against bad outcomes. *See* Marshall v. Jerrico, 446 U.S. 238, 243 (1980).

(In *Gibson*, members of the Alabama Board of Optometrists stood to profit by revoking the licenses of their competitors). Similarly, in *McClure, supra*, where the impartiality of social security hearing officers was questioned, the Court said that "[i]n the absence of proof of financial interest . . . there is no basis for assuming a derivative bias among their hearing officers." 456 U.S. at 197 (emphasis added).[16] Thus, the Court has not retreated from its holdings in *Ward* and *Gibson*, where the showing of conflict of interest was demonstrable. As discussed, the case at bar involves decisionmakers with a manifest and significant bias.

Some of the courts that have considered the procedural due process challenge to MPPAA have underestimated the significance of the trustees' fiduciary duty. The Supreme Court's declaration in *Amax* leaves little doubt as to the question of trustee bias:

> Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties.

453 U.S. at 329. Given the trustees' fiduciary duty to the plan, and their consequent personal liability if the plan is not adequately funded, we again find ourselves in agreement with Judge Aldrich:

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[16] *McClure* involved the administration of Part B of the Medicare program under the Social Security Act, which provides federally subsidized insurance for certain medical costs. The Secretary of [Health and] Human Services is authorized to contract with private insurance carriers to administer the payment of Part B claims. Carriers often hire private hearing examiners to determine claimants' eligibility under Part B. Plaintiff alleged that, as the hearing officers were appointed by the Insurer, they would be biased against claimants. The Court found that as payments to claimants were made by the federal government, not the carrier, and as the hearing examiner was paid by the government, not the carrier, there was no disqualifying conflict of interest.

> This is not a mere appearance of bias; it is a real, indeed multiple, bias, rooted both in the trustees' statutory duty and in their personal circumstances.

Keith Fulton, 762 F.2d at 1148.

In view of the bias of the trustees, MPPAA can pass constitutional muster only if the trustees lack discretion or if arbitration serves as a cleansing device. We take these points up in turn.

2. *Trustee Discretion*

An important element of the First Circuit's holding that MPPAA provided due process was its belief that the trustees' calculation was largely ministerial:

> The Act specifically requires that a plan's rules for determining withdrawal liability "operate and be applied uniformly with respect to each employer." 29 U.S.C. § 1394(b). . . . Thus, in future years, the trustee's function is likely to become that of simply applying a designated method of computation to all later withdrawals.

Keith Fulton, 762 F.2d at 1141. *See also Board of Trustees of the Western Conference*, 749 F.2d at 1403-04; *Republic Industries*, 718 F.2d at 640 n.13. If the trustees had no discretion, their bias would obviously be insignificant. Moreover, if, as the First Circuit believes, they have little discretion, an extra layer of review—arbitration—may ensure due process. However, we disagree with the First Circuit's assessment of the trustees' role, believing instead that the trustees have wide and significant discretion.

While the trustees must apply their chosen actuarial method uniformly among withdrawn employers, the statute leaves them free to pick among the four suggested methods *or* to choose their own. Moreover, as Judge Aldrich emphasized, determinations of appropriate discount rates, a matter that varies in each case, may involve large amounts of money. In *Keith Fulton*, the trustees had selected a discount rate of 7.5% although expert testimony suggested that a rate of 14.5% would have been reasonable. The difference between the two accounted for a gap of a considerable amount. Additionally, assessments under §§ 1382-1399 require trustees to determine whether an employer falls under one of several statutory exemptions. This decision involves complex determinations such as whether a sale of assets is a bona fide arm's length deal. 29 U.S.C. § 1384 (1982).[17]

Not only are these matters in which the exercise of significant discretion is unavoidable, but the trustees' determination can be the difference between a finding of *no* liability and a finding of liability in a large amount. The need to make such determinations belies the notion that the trustees perform a largely ministerial function. Indeed, the legislative history of MPPAA reveals that Congress expected the trustees to exercise wide discretion. Congress realized that "[p]lan fiduciaries are given a great deal of flexibility to strike a balance among the competing considerations of encouraging new entrants, discouraging withdrawals, easing administrative burdens, and protecting the financial soundness of a fund." H.R. Rep. No. 869, 96th Cong., 2d Sess. 67, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2935.

We conclude that the due process problem occasioned by the trustees' bias is not eliminated or even much attenuated by the fact that the trustees lack discretion to apply different actuarial methods to different withdrawing employers.[18] The remaining question is whether the availability of arbitration ensures the requisite due process to withdrawing employers.

3. *Arbitration*

While some of the cases holding that particular panels were unconstitutionally biased involved situations where judicial review was available, none involved the extra layer of arbitral review that MPPAA requires. On one occasion we squarely considered the question whether an extra layer of review sufficed to provide a fair hearing despite an initially biased tribunal. In that case, *Goodman v. Laborers' Int'l Union of NA*, 742 F.2d 780 (3d Cir. 1984), we expressed uncertainty as to whether *de novo* review rescues a tainted hearing, but found that where the tainted decision was reviewed under a deferential standard (under which it was to be affirmed if "amply supported by the evidence,") the subsequent hearing did not cure the defect. *Id.* at 785, *quoting*.[19] We see no reason to depart from the *ratio decidendi* of *Goodman*: that where an initial hearing is tainted by bias, arbitration cannot provide the requisite fair hearing if the arbitration proceeding is not *de novo*.[20] Neither the appearance nor reality of fairness is served when a tainted verdict is presumed correct in subsequent review.

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[17] Under § 1384, withdrawing employers are exempt from liability payments if their withdrawal results from a *bona fide* arm's length sale of assets to another company that assumes its contractual obligations.

[18] We must also reject the suggestion, advanced tangentially by the majority in *Keith Fulton*, that the trustees' role is not adjudicative in nature. The trustees perform the judicial task of making case-by-case determinations significantly affecting the property of employers. In holding in *Jerrico, supra*, that the Assistant Regional Administrator's function was prosecutorial rather than judicial, the Court noted that he "rules on no disputed factual or legal questions." 446 U.S. at 247. As noted, the trustees must frequently make complex legal and factual determinations.

[19] *Goodman* involved a union member charged in a union disciplinary proceeding. Although plaintiff asserted his right to impartial hearing as derived from statute, not from the Constitution, the principle is the same.

[20] The one case in which the this circuit seemed to tolerate a degree of acknowledged bias, First Jersey Securities, Inc. v. Bergen, 605 F.2d 690 (3d Cir. 1979), involved a self-regulatory scheme of the securities industry, over which the SEC had *de novo* review.

We do not deny the *Keith Fulton* court's view that the presumptions are rational means of promoting uniformity and discouraging litigation. For this reason, they survive a substantive due process analysis and a *Mathews* test. Similarly, the replacement of contingent withdrawal liability with mandatory liability and the repeal of the 30% maximum, *see supra* note 1, though harsh, are within Congress' power. As Judge Coffin explained, these provisions were rational responses to a serious problem. As we have noted, however, while a substantive due process analysis and a *Mathews* test permit the balancing of fairness and efficiency, the right to an impartial decisionmaker permits no such balancing. Regardless of the importance of ensuring the solvency of pension plans, and the reasonable relation between that end and the statutory scheme, one requirement can be clearly deduced from basic principles of judicial fairness and from Supreme Court jurisprudence: the assessment of liability must be made by an unbiased party. In sum, because the trustees are biased and have significant discretion, and because their determination of liability is deferentially reviewed in arbitration and in district court, we believe MPPAA deprives employers of their constitutional right to a fair hearing.

VI. *SEVERABILITY*

As the Supreme Court recently stated:

> A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary.

Regan v. Time, Inc., —— U.S. ——, 104 S.Ct. 3262, 3269 (1984). We are, therefore, obliged to consider whether the unconstitutional aspect[s] of MPPAA can

be severed from the remaining statutory scheme to leave the fundamentals of the scheme intact. There are three aspects of MPPAA, which, in concert, deprive withdrawing employers of an impartial deicsionmaker: the initial determination of liability by biased trustees; the deference the arbitrator must grant to the trustees' determination; and the deference the district court must grant to the arbitrator's determination. If severing only one of these provisions from the scheme will save the constitutionality of MPPAA, we are obliged by principles of statutory construction and the separation-of-powers concerns that underlie them to strike down only that provision. *Id.* These principles further require that we sever that provision which is least central to Congress' scheme. In the interests of economy, rather than determining the severability of each of these provisions, we shall make a preliminary determination as to which section is least central to the scheme and then examine whether that section is severable.

The provision that the district court defer to the arbitrator's factual findings is commonplace in the context of judicial review of arbitration and represents a considered decision by Congress the district courts not be authorized to second-guess arbitrators' decisions. *See supra* note 9. Should our decision result in *de novo* review of the arbitrator's decision in district court, MPPAA would be rendered different from most arbitral schemes in apparent defiance of Congress' clear intent.

The provision placing the initial determination in the hands of the trustees represents, in part, Congress' effort to capitalize on the expertise of persons experienced in and devoted to the pension fund process. Striking down only that provision would require deciding who should replace the trustees in making the initial assessment of liability—a matter not appropriate for judicial determination.

We conclude that the least intrusive means of adjusting MPPAA to preserve its constitutionality is to eliminate in 1401(a)(3)(A)'s stipulation that the arbitrator accord a presumption of correctness to the trustees' determination of liability. We must now determine whether § 1401(a)(3)(A) is properly severable from MPPAA under the Supreme Court's standards governing severability and whether severing this section does, in fact, save the constitutionality of the scheme.

A. *Is § 1401(a)(3)(A) Severable From MPPAA?*

The Supreme Court has set forth the following test of severability:

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Buckley v. Valeo, 424 U.S. 1, 108-09 (1976), *quoting Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 234 (1932). Under this standard, "the presumption is in favor of severability." *Regan*, 104 S.Ct. at 3269. There is no question that MPPAA would remain fully operative as a coherent statutory scheme if the trustees' determination of withdrawal liability were not presumed correct in arbitration.[21] The remaining question, then, is whether Congress would have passed MPPAA without the presumption in favor of the trustees' determination. For several reasons, we believe it would have.

First, MPPAA amended ERISA, which contains a severability clause. Section 1139 stipulates that if any provision of ERISA is deemed unconstitutional, the remainder of the Act is to remain intact. Section 1139 was not repealed or amended by MPPAA. Thus, it was clearly Congress' intent that provisions of the complicated scheme were to be severable.[22] MPPAA contains many provisions that serve Congress' aim of discouraging plan withdrawals and ensuring plan solvency, *e.g.*, repeal of the 30% maximum liability, and provisions for mandatory withdrawal liability. The legislative history offers no suggestion, and we have no reason to believe, that Congress would not have passed MPPAA simply because it could not insulate the trustees' initial determination of liability from *de novo* review.

Accordingly, we find § 1401(a)(3)(A) to be severable from the rest of the statutory scheme.

B. *Does The Severing of § 1401(a)(3)(A) Rescue The Scheme's Constitutionality?*

We believe that the arbitrator's exercise of *de novo* review over the trustees' determination would suffice to meet the requirement of an impartial decisionmaker. The Ninth and Second Circuits have already held that a fair *de novo* hearing removes the taint of an earlier biased tribunal. *Perry v. Milk Drivers' & Dairy Employees Union Local 302*, 656 F.2d 536, 539 (9th Cir. 1981); *Rosario v. Ladies Garment Cutters' Local 10*, 605 F.2d 1228, 1244-45 (2d Cir. 1979). It seems clear that a full and fair *de novo* hearing before an arbitrator offers the withdrawing employer a fair disposition of his case and satisfies the appearance of justice.[23]

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[21] The initial *Keith Fulton* panel, whose decision was vacated on other grounds, reached this same conclusion. 762 F.2d at 1134 (1st Cir. 1984).

[22] The existence of a "savings clause" does not end the severability inquiry, but is powerful evidence of Congress' intent. *See* Immigration & Naturalization Service v. Chadha, 462 U.S. 919, 932 (1983).

[23] This conclusion is not undermined by the Supreme Court's discussion in *Ward, supra*:

> Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the state

The trustees' determination is the first in a scheme that requires arbitration and judicial review. We are satisfied that if the arbitrator does not accord the trustees' determination a presumption of correctness, MPPAA will meet the constitutional requirement of providing an impartial decisionmaker.[24]

> eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.

409 U.S. 57 at 61-62. We note that the Court referred to a neutral *judge*. While the trustees' role is judicial in character, it does not pose the same problem, with respect to purity of the judicial system, as does a biased judge sitting in a courtroom and determining guilt or innocence, or liability *vel non*. Indeed, this limiting interpretation of the above passage in *Ward* has already been adopted by this court. Pennsylvania v. United States of America, No. 85-5186 *et al.* slip op. at 7 (3d Cir. Jan. 6, 1986) ("*Ward*, however, involved a criminal proceeding . . . [T]he present matter [is] strictly administrative . . . ."). *Accord* Wolkenstein v. Reville, 694 F.2d 35, 44 (2d Cir. 1982) ("But we are by no means sure that this ruling [*Ward*], made in a criminal case, applies to the decision of a school administrator . . . ."; E.E.O.C. v. Sears, Roebuck & Co., 504 F. Supp. 241, 252 n.21 (N.D. Ill. 1980) (*Ward* holding that *de novo* trial does not cure earlier tainted hearing is limited to adjudicative setting).

[24] We note that Judge Aldrich, despite his serious objections to the MPPAA procedures, concluded that the elimination of the presumption in favor of the trustees' determination would cure MPPAA's constitutional deficiencies. 762 F.2d at 1144.

Additionally, we note that MPPAA without the presumption in favor of the trustees' determination passes a *Mathews* test. (Although, as we have explained, a *Mathews* test is inappropriate to resolve allegations of a biased decisionmaker, Yahn has also questioned the adequacy of the procedural safeguards afforded by MPPAA generally.) The district court found that MPPAA passed a *Mathews* test for several reasons. First, it found that the state interest in protecting the vitality of pension funds is quite substantial. The legislative history of MPPAA reveals that Congress was extremely concerned about the solvency of pension plans which had been greatly threatened by employer withdrawals. Second, the district court found that the likelihood of erroneous deprivation was minimized by two layers of review—arbitration and judicial review by a district court. Finally, if a finding of overpayments is made,

Thus, we will strike down only the requirement that the trustees' determination be presumed correct in arbitration, leaving the rest of MPPAA fully operative.

VII. *CONCLUSION*

We will affirm the district court's grant of summary judgment for the Plan and its dismissal of Yahn's counterclaim. We will vacate the district court's denial of attorney's fees, costs and liquidated damages to the Plan. We hold that, contrary to the decision of the district court, MPPAA denies withdrawing employers their constitutional right to procedural due process. We find the statutory scheme constitutional after severing only the provision of MPPAA that accords the trustees' determination of withdrawal liability a presumption of correctness. We will remand this case for proceedings consistent with this opinion.

Our constitutional holding does not affect our other holdings with respect to Yahn's liability for withdrawal payments and for attorney's fees, liquidated damages and costs. Because we have found the statutory scheme constitutional once the arbitrator's deference to the trustees' determination is severed, the unconstitutional aspect of MPPAA has not affected Yahn: Yahn's case has yet to go to arbitration. The extent of Yahn's liability will now be determined in arbitration with no presumption in favor of the trustees' assessment. In the interim, Yahn must make a withdrawal liability payment because that is required by the statutory scheme (which, except for the

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the excessive amounts are refunded with interest to the employer; thus the individual interest affected, while not minimal, is not overwhelming. Under the circumstances, the district court found that MPPAA, even with the presumption in favor of the trustees' determination, survived the *Mathews* test. We need not determine whether that holding was correct, because given the *de novo* review by an arbitrator that our decision today requires, there is little question that MPPAA provides sufficient procedural safeguards to pass a *Mathews* test.

presumption in arbitration, we have upheld). Yahn must also pay the Plan's attorney's fees, costs and liquidated damages because such fees and costs are mandatory upon a judgment for delinquent payments in favor of a pension plan, and we have affirmed the district court's judgment in favor of the Plan with respect to Yahn's delinquent payments. In calculating attorney's fees, the district court may reduce the award to take into account the fact that some of the Plan's attorney's fees were expended in defense against Yahn's successful constitutional challenge. *See Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983).

SEITZ, *Circuit Judge*, dissenting in part.

I disagree with the majority's important conclusion in Part V that the presumption of correctness accorded the plan trustees' determination of withdrawal liability in arbitration proceedings under 29 U.S.C. § 1401(1)(a)(3)(A) violates due process. The majority's decision, in my view, does unwarranted violence to Congressional intent and is an open invitation to proliferated and expanded arbitration proceedings. Because of my position, I need not reach the question of severability discussed in Part VI of the majority opinion.

The majority opinion fails to differentiate among the types of decisions the plan sponsors are called upon to make. First, the majority's doctrinal approach is inapplicable to the choice of method for calculating withdrawal liability, *see* 29 U.S.C. § 1391, a choice that merely involves the selection of generally applicable rules of plan governance. Second, with respect to actuarial assumptions used by plan sponsors, the majority overstates the amount of discretion sponsors enjoy. What limited discretion they do have, coupled with the availability of arbitration and judicial review, is in my view well within the constitutional power of Congress to grant. Finally, although the majority mentions the sponsors' responsibility to determine the applicability of a statutory exemption, I consider that a separate issue and would not reach it in this case.

The majority's most serious error is to misread the nature of the trustees' power to choose the actuarial method for calculating the withdrawing employer's share of unfunded vested liabilities. 29 U.S.C. § 1391. The majority treats this decision as one to be made only when the first employer withdraws. As I read the statute, however, this is not an adjudicative function at all, but rather a matter of establishing general rules for the plan's administration *prior to* any withdrawals. Unless the plan is amended pursuant to 29 U.S.C. § 1391(c), the trustees are required to employ the presumptive method described in § 1391(b). Any amendment must apply uniformly to all withdrawing employers. Id. § 1394(b). The majority recognizes this uniformity requirement, but fails to appreciate the significance of section 1394(a), which specifies that "[n]o plan rule or amendment . . . under section . . . 1391(c) of this title may be applied without the employer's consent with respect to liability for a withdrawal . . . which occurred before the date on which the rule or amendment was adopted."[1] Thus, when Yahn withdrew from the pension plan, the trustees simply had no choice about which method to employ: either the method specified by amendment, or—if the plan was never amended—the presumptive method.

I do not think that the trustees are disabled by their position from performing this sort of legislative, as opposed to adjudicative, function. The Supreme Court has stated that "due process demands impartiality on the part of those who function in *judicial or quasi-judicial* capacities." *Schweiker v. McClure*, 456 U.S. 188 (1982) (emphasis added). And the cases cited by the majority involved persons in judicial roles. I find it difficult to understand the majority's apparent conclusion that fiduciaries of the pension fund should be held incompetent to establish general plan rules for calculating withdrawal liability.

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[1] The accompanying House Committee report explains:

> In order to protect an employer from retroactive changes in a plan's withdrawal liability rules the bill would restrict the application of plan rules or amendments relating to an employer's withdrawal liability with respect to a withdrawal occurring before its date of adoption, unless the employer in question consents to its retroactive application.

H.R. Rep. (Educ. and Lab. Comm.) No. 869—Part I, 96th Cong., 2d Sess. 85, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2918, 2953. *See also* H.R. Rep. (Ways and Means Comm.) No. 869—Part II, 96th Cong., 2d Sess. 30, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2992, 3019 (same).

The trustees' choice of actuarial assumptions (including interest rates, mortality rates, turnover rates, and the like) presents a somewhat different problem, since admittedly some if not all of these assumptions will tend to vary with time. However, whatever discretion the trustees may have in this regard does not seem to me to create constitutional difficulties.

It is worth noting initially that the fiduciary duty of the trustees to the fund beneficiaries does not entail a duty to assess the largest reasonable liability against a withdrawing employer. Under the Act, trustees must employ either actuarial assumptions promulgated by the PBGC, or assumptions "which, in the aggregate, are reasonable . . . and which, in combination, offer *the actuary's best estimate of anticipated experience under the plan.*" 29 U.S.C. § 1393 (emphasis added). There is nothing in the Act to suggest that trustees are expected to select actuarial assumptions with an eye to maximizing withdrawal liability, rather than those that will best reflect the plan's experience.[2]

Moreover, the trustees' discretion to make actuarial assumptions is far more limited than the majority suggests. First, the statutory language makes clear that an actuary must be employed in setting actuarial assumptions. Indeed, the requirement that the assumptions reflect "the actuary's *best estimate* of anticipated experience under the plan" suggests that the trustees are not generally free to reject the actuary's estimates. This interpretation is buttressed by the legislative history of 29 U.S.C. § 1082(c)(3), the ERISA section, enacted in 1974, concerning actuarial assumptions to be used in determining if minimum funding standards have been met. That section contains language identical to that in § 1393 requiring assumptions that "in the aggregate, are reasonable," and that reflect the actuary's "best estimate" of anticipated plan experience.

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[2] The majority relies on legislative history to support its view that "Congress expected the trustees to exercise wide discretion." Maj. op., typescript at 30 (citing H.R. Rep. No. 869—Part I, 1980 U.S. Code Cong. & Ad. News at 2935). But the majority's undifferentiated view of the discretion exercised by the trustees leads it to misread the passage it quotes. Read in context, the passage clearly refers to the trustees' discretion to adopt *plan rules*, such as the method for calculating withdrawal liability and for determining whether the so-called de minimis exemption, 29 U.S.C. § 1389, applies. As noted, however, such plan rules and amendments must operate uniformly as to all employers and may not operate retroactively, id. § 1384. Thus, the majority's due process analysis is therefore inapt. The passage does not suggest that the trustees' case-by-case determinations of withdrawal liability—to which that analysis would properly apply—are subject to similarly wide discretion.

The legislative history of section 1082 indicates Congress' belief that such assumptions must be "independently determined by an actuary," and that "it is inappropriate for an employer to substitute his judgment for that of a qualified actuary" with respect to them. S. Rep. No. 383, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4890, 4954. Thus, withdrawal liability calculated on the basis of actuarial assumptions at odds with those recommended by the plan actuary could very well be considered presumptively unreasonable.[3]

I also read the statute to require the trustees, as far as possible, to use the same actuarial assumptions for calculating withdrawal liability that they use for all other purposes.[4] Both sections 1082(c)(3) and 1393 of title 29

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[3] The First Circuit has cited one case in which the trustees rejected the actuary's assumptions and the arbitrator found the trustees' assumptions unreasonable. *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Indus. Pension Fund,* 762 F.2d 1137, 1141 n.3 (1st Cir. 1985) (in banc) (citing *Woodward Sand Co. and Operating Engineers' Pension Trust,* 3 E.B.C. (BNA) 2351 (1982) (Kaufman, Arb.)).

[4] Title 29 U.S.C. § 1023 requires an annual filing with the Secretary of Labor, including, inter alia, a statement of actuarial assumptions used by the plan. Id. § 1023(d)(6). The report must be pre-

require, in identical words, the use of "actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan." *See also* H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5065 ("The conferees intend that under this provision [section 1082(c)(3)] *a single set of actuarial assumptions will be required for all purposes* (e.g., for the minmium funding standards, reporting to the Department of Labor and to participants and beneficiaries, financial reporting to stockholders, etc.)"; emphasis added). Although section 1082 was enacted in 1974, prior to MPPAA, I cannot believe that Congress could have intended to permit the trustees to use different assumptions under section 1393 when it used precisely the same words as those in the earlier section. Using different assumptions could very well be attacked as presumptively unreasonable both in arbitration and on judicial review.

My view that the trustees are required to act in a reasonably consistent manner greatly limits their discretion, because the use of assumptions overly favorable to the fund in one context will tend to have offsetting unfavorable consequences in other contexts. For example, the use of assumptions (such as low interest rates) that would tend to increase the fund's unfunded vested liability for withdrawal liability purposes would also make it more difficult for the plan to meet the minimum funding requirements of § 1082. My reading of the cases cited by the majority does not convince me that whatever residual discretion the trustees enjoy is inconsistent with due process.

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pared and signed by a qualified actuary. *See also* 26 U.S.C. § 412(c) (requiring similar determinations for income tax purposes). The actuarial assumptions are used to determine whether minimum funding standards, a key requirement of ERISA, have been met.

Finally, the majority relies on the fact that the trustees are responsible in the first instance for determining whether a withdrawing employer falls within a statutory exemption to liability. Maj. op., typescript at 39. Since there is no challenge in this case on that ground, and since the precise scope of arbitral and judicial review in this area is far from clear,[5] I would leave for another day the question whether the trustees' decision with respect to a statutory exemption is entitled to a presumption of correctness, on either factual or legal grounds.

The majority's concern for fairness to the employer are not entirely unwarranted, but the result it reaches—erasing from the statute the presumption of correctness accorded the trustees' determination of liability in arbitration proceedings—promises to frustrate severely the congressional enforcement scheme. Without the presumption the plan may well, as Congress feared, "be helpless to resist dilatory tactics by a withdrawing employer—tactics that could, and could be intended to, result in prohibitive collection costs to the plan." Sen. Comm. on Labor and Human Resources, 96th Cong., 2d Sess., § *1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* 21 (1980), quoted in *Keith Fulton*, 762 F.2d at 1143 n.7.

Accordingly, I dissent from the judgment of the majority as to Parts V and VI.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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[5] I am aware of no case discussing this issue. In *Republic Industries v. Teamsters Joint Council*, 718 F.2d 628, 641 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 3553 (1984), the court indicated that the arbitrator's legal rulings are subject to judicial review, but did not discuss the scope of that review or the degree of deference commanded by the arbitrator.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-1690

UNITED RETAIL & WHOLESALE EMPLOYEES
TEAMSTERS UNION LOCAL NO. 115
PENSION PLAN, *et al.*

v.

YAHN & MCDONNELL, INC., *et al.*

MEMORANDUM AND ORDER

KELLY, J. DECEMBER 21, 1984

Presently before this court is plaintiffs'[1] motion for summary judgment[2] and plaintiffs' motion for a protective order.

The issues before me are: (1) whether or not the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") is unconstitutional, and (2) whether or not defendant has a valid counterclaim. The counterclaim raises the question of whether or not the fiduciaries, because of their possible negligence which may have increased the monetary obligation of the defendants to the plan, must indemnify the defendants.

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[1] United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan and the Trustees of the above mentioned plan (Robert E. Zinner, Michael Padella, John P. Morris, and James Smith, Jr.)

[2] A partial summary judgment was granted on September 28, 1984, which required the defendants to make monthly withdrawal payments to the pension plan in accordance with the determination and schedules imposed by the pension plan pending final adjudication of liability.

The first constitutional argument made by defendants is that the MPPAA, because it requires withdrawal payments, Title 29 U.S.C. §§ 1381, *et seq.*, violates substantive due process under the Fifth Amendment to the Constitution, namely, by taking certain economic rights of the defendants in an arbitrary and irrational manner. The Third Circuit Court of Appeals has held that the MPPAA meets the substantive due process constitutional standard because it provides a rational means of safeguarding the employees' interests in a pension plan. *Terson Company, Inc., et al. v. Bakery Drivers and Salesmen Local 194, et al.*, 739 F.2d 118 (3d Cir. 1984).[3]

Another argument defendants offer is that the MPPAA, because it imposes withdrawal payment liability which otherwise did not exist, constitutes a taking without just compensation in violation of the Fifth Amendment to the United States Constitution. The Court of Appeals in *Terson, supra*, held that MPPAA does not violate the taking clause.

The defendants further argue that the arbitration procedure violates their seventh amendment right to a jury trial. The Third Circuit held in *Terson* with respect to the MPPAA: "[I]t is settled that when Congress creates new public rights and remedies and commits their enforcement to a tribunal other than a court of law, there is no seventh amendment right to a jury." (citations omitted) 739 F.2d at 121. Accordingly there is no seventh amendment violation.

The last constitutional claim made by the defendants presents a more close question. Defendants assert that their procedural due process rights have been violated, since there is no provision for a hearing prior to the requirement that they make withdrawal payments. Plaintiffs suggest to this court that the decision in *Terson* is controlling in this matter. The court in *Terson* held in regard to procedural due process that requiring arbitration did not violate it. The questions of: (1) whether the duty to make withdrawal payments before a hearing, and (2) whether the fact that a partial party makes the initial determination of withdrawal liability, violates procedural due process, were not before the court in *Terson*, as they are before me. Thus, *Terson* cannot be controlling on these two questions.

The MPPAA states in pertinent part (29 U.S.C. § 1399):

> (b) Notification, demand for payment, and review upon complete or partial withdrawal by employer
>
> (1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—
>
> (A) notify the employer of—
>
> (i) the amount of the liability, and
>
> (ii) the schedule for liability payments, and

---

[3] *See also Peick, et al. v. Pension Benefit Guaranty Corp., et al.*, 539 F.Supp. 1025, 1044 (N.D. Ill. 1982) aff'd 724 F.2d 1247 (7th Cir. 1983) *cert. denied*, 104 S.Ct. 3554 (1984). The court stated:

> It has long been a tenet of constitutional law that those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legitimate end . . . . Multiemployer plans have been the subject for decades of pre-MPPAA federal regulation under Section 165 (now Section 401) of the Internal Revenue Code, Section 302 of the Labor-Management Relations Act of 1947, and the Welfare and Pension Plans Disclosure Act of 1958. Moreover, and most significant, the 1974 enactment of ERISA demonstrated in the clearest possible way that contractual limitations on withdrawal liability were themselves susceptible to federal displacement. (citation omitted).

(B) demand payment in accordance with the schedule.

(2) (A) No later than 90 days after the employer receives the notice described in paragraph (1), the employer—

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

(B) After a reasonable review of any matter raised, the plan sponsor shall notify the employer of—

(i) the plan sponsor's decision,

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

* * * *

(c) (I) (E) (2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b) (I) of this section begnning no later than 60 days after the date of the demand *notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.* (emphasis added)

Requests for arbitration under 29 U.S.C. § 1401 may be made within the sixty day period prior to the requirement that withdrawal payments be made, 29 U.S.C. § 1399(b) (c), *supra*; however, there is no guarantee that a hearing will be granted within the sixty day period. If an employer does not make the withdrawal payments as required during the interim period, the imposition of penalties are provided for within 29 U.S.C. § 1132.

Defendants have argued that the United States Supreme Court's decision in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) is controlling in this matter. The Court in *North Georgia Finishing* dealt with a situation which is in some ways similar to the case at bar. A Georgia statute permitted a writ of garnishment to be issued *ex parte*. Plaintiff there secured a writ of garnishment on defendant's bank account. This was done by meeting the statutory requirements which required the executing of an affidavit and posting a bond twice the value of the debt allegedly due. The only manner by which the defendant could free his property garnished was to post a bond in the amount of the alleged debt. The Supreme Court held that because the writ of garnishment was isued by a clerk without participation by a judge, and there was no provisions for an early hearing to establish probable cause for the garnishment, the statute violated procedural due process. Further, the Court stated that some procedure is required so that initial error is not made thus causing irreparable injury.

One year after *North Georgia Finishing, supra*, the United States Supreme Court further clarified the subject of procedural due process in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Court was faced with the question of whether termination of Social Security benefits prior to a hearing violated procedural due process. The Court set out the following standard when reviewing whether or not procedural due process was provided:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, supra, 424 U.S. at 335.

After the Court balanced the various factors, it held that procedural due process was provided.

Turning now to the instant matter, the defendants previously entered into an employment contract which provided for payments to be made to a pension fund. Subsequent legislation by Congress when it passed the MPPAA changed to some degree the obligation of the defendants to make payment to this fund.[4]

Now defendants' obligation to this fund is practically certain upon withdrawal, but the amount is in dispute. Conversely, the interests of the government in the matter is substantial. Indeed, Congress' purpose, *inter alia*, of enacting MPPAA was to assure that participants actually receive benefits, thus it protects employees' reliance upon the promise of vested pension benefits. *Peick, et al. v. Pension Benefit Guaranty Corp., et al.*, 539 F. Supp. 1025 (N.D. Ill. 1982) *aff'd* 724 F.2d 1247 (7th Cir. 1983) *cert. denied* 104 S.Ct. 3554 (1984). Further, the procedure which Congress has enacted to remedy disputes between parties upon withdrawal cannot be passed over lightly. Indeed, "substantial weight must be given to the good faith judgment of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals." *Mathews*, 319 U.S. at 348. The situation in *Mathews* where the guardians of the Social Security Fund decided which recipient initially should be terminated is analogous to the case at bar, where the fiduciaries of the pension plan initially determine the amount of the withdrawal payment. Moreover any decision of the pension plan fiduciary is subject to arbitration and judicial review in district court of the United States. 29 U.S.C. §§ 1401, 1451. Therefore, the opportunity for irreparable harm is small.

Acordingly, the procedure set out in MPPAA fulfills the requirements of due process.

I turn now to defendants' counterclaim. Defendants assert that if the pension plan fiduciaries (some of the plaintiffs here) obligated the plan to pay vested benefits which are not fully funded, then the fiduciaries were grossly negligent thus breaching their fiduciary duties to the plan. The defendants then assert that the plaintiff fiduciaries owe either contribution or indemnity because of their breach of duty. The defendants offer no authority for their position.

This matter is not ripe for determination. *Cf. Abbott Laboratories, et al. v. Gardner, Secretary of Health, Education and Welfare, et al.*, 387 U.S. 136, 148 (1967) (Ripeness doctrine rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized.) Here the parties have access to arbitration, pursuant to statute 29 U.S.C. § 1401. Indeed, the parties by stipulation have kept the arbitration procedure in abeyance. Therefore, I must deny review of the counterclaim, since the claim is a proper matter for arbitration.

---

[4] See Note 3 *supra*.

Plaintiffs argue that counsel fees and other penalties are due because the defendants have been delinquent pursuant to 29 U.S.C. §§ 1451, 1445, 1132. However, until this matter is finally resolved either at arbitration or finally in district court, it is premature to assess these amounts. *Commission Drivers Local 187 Pension Fund v. Hertz Corp.*, 3 EBC 1801 (E.D. Pa. 1982).

Because of the foregoing, plaintiffs' motion for a protective order is rendered moot. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-1690

UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS
UNION LOCAL NO. 115 PENSION PLAN, *et al.*

v.

YAHN & MCDONNELL, INC., *et al.*

ORDER

AND NOW, this 21st day of December, 1984, for the reasons set forth in the foregoing Memorandum, it is hereby ORDERED that:

1. Plaintiffs' motion for summary judgment is GRANTED.

2. Defendants' counterclaim is DISMISSED, to be resolved at arbitration.

3. Plaintiffs' request for attorney's fees and imposition of penalties upon defendants is DISMISSED without prejudice.

4. Plaintiffs' motion for a protective order is RENDERED MOOT.

BY THE COURT:

/s/ James McGirr Kelly, Jr.

JAMES MCGIRR KELLY, JR.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-1035 & 85-1065

UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN and ROBERT E. ZIMMER, MICHAEL PAOLELLA, JOHN P. MORRIS and JAMES SMITH, JR., TRUSTEES OF THE UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN,

Appellees/Cross-Appellants

v.

YAHN & MCDONNELL, INC. and THE PENNSTAR COMPANY,

Appellants in 85-1035/
Cross-Appellees

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

(D.C. Civil No. 83-1690)

[Filed March 31, 1986]

Present: SEITZ and BECKER, *Circuit Judges* and ROSENN, *Senior Circuit Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 12, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, entered December 24, 1984, and January 15, 1985, be, and the same are hereby affirmed insofar as they granted summary judgment for the Plan and dismissed Yahn's counterclaim. It is further ordered and adjudged that the said orders of the District Court are vacated insofar as they denied attorney's fees, costs and liquidated damages to the Plan. It is further ordered that the cause be remanded to the said District Court for further proceedings consistent with the opinion of this Court. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Sally Mrvos
Clerk

March 31, 1986

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-1035 & 85-1065

UNITED RETAIL & WHOLESALE EMPLOYEES, ETC.

vs.

YAHN & MCDONNELL, INC., ETC.

April 14, 1986

Present: SEITZ, BECKER and ROSENN, *Circuit Judges*

1. Motion of the Pension Benefit Guaranty Corporation to intervene in this proceeding so as to be able to file a petition for rehearing and suggestion for rehearing *in banc* and to seek further review, if necessary, of the decision of a panel of this Court issued on March 31, 1986.
2. Copy of the petition for rehearing.
3. There is presently pending before the Court in banc, a petition for rehearing by United Retail, etc.

in the above-entitled cases. Any answer which would be due by April 24, 1986, will be forwarded to you upon receipt of same.

Respectfully,

/s/ Michelle Liverette
Deputy Clerk
Direct Dial 597-3134

enc.

The foregoing Motion is granted.

By the Court,

/s/ Edward R. Becker
Circuit Judge

Dated: April 15, 1986

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1035 & 1065

UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN AND ROBERT E. ZIMMER, MICHAEL PAOLELLA, JOHN P. MORRIS and JAMES SMITH, JR., TRUSTEES OF THE UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL 115 PENSION PLAN,

Appellees/Cross-Appellants

v.

YAHN & MCDONNELL, INC.
and THE PENNSTAR COMPANY,
Appellants in 85-1035/Cross-Appellees

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, ROSENN,* *Circuit Judges*

The petition for rehearing filed by Intervenor, Pension Benefit Guaranty Corporation in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Seitz, Gibbons, Garth, and Sloviter would grant the petition for rehearing.

---

* As to panel rehearing only.

By the Court,

/s/ Edward R. Becker
Judge

Dated: April 23, 1986

APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-1035 & 85-1065

UNITED RETAIL & WHOLESALE EMPLOYEES
TEAMSTERS UNION LOCAL NO. 115
PENSION PLAN, *et al.*,
Appellees/Cross-Appellants,

and

PENSION BENEFIT GUARANTY CORPORATION,
Intervenor,

v.

YAHN & MCDONNELL, INC. and THE PENNSTAR COMPANY
Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 83-1690)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to 28 U.S.C. § 1252, the Pension Benefit Guaranty Corporation hereby appeals to the Supreme Court of the United States from the judgment of this court in the above-captioned action entered on March 31, 1986.

/s/ Edward R. Mackiewicz
EDWARD R. MACKIEWICZ
General Counsel

MITCHELL L. STRICKLER
Deputy General Counsel

PETER H. GOULD
Deputy Assistant General
Counsel

DAVID F. POWER
Attorney

Attorneys for Intervenor
PENSION BENEFIT GUARANTY
CORPORATION
Legal Department
2020 K Street, N.W.
PENSION BENEFIT GUARANTY
CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006
(202) 956-5023

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85-1035 and 85-1065

United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan and Robert E. Zimmer, Michael Paolella, John P. Morris and James Smith, Jr., Trustees of the United Retail & Wholesale Employees Teamsters Union Local 115 Pension Plan,

Appellants in No. 85-1065

and

Pension Benefit Guaranty Corporation,

Intervenor

vs.

Yahn & McDonnell, Inc. and The Pennstar Company,

Appellants in No. 85-1035

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to 28 U.S.C. § 1252, United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan et al., Appellees/Cross-Appellants, hereby appeal to the Supreme Court of the United States from the judgment of this Court entered on March 31, 1986 in the above-captioned matter.

Respectfully submitted,

/s/ Paula R. Markowitz
Richard H. Markowitz,
Esquire
Paula R. Markowitz,
Esquire
121 S. Broad St., 11th Floor
Philadelphia, PA 19107

APPENDIX H

29 U.S.C. § 1104

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable while under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

29 U.S.C. § 1109

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

29 U.S.C. § 1301(a)(10)

§ 1301. Definitions

(a) For purposes of this subchapter, the term—

* * * *

(10) "plan sponsor" means, with respect to a multiemployer plan—

(A) the plan's joint board of trustees, or

(B) if the plan has no joint board of trustees, the plan administrator;

29 U.S.C. § 1381(a)

§ 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

29 U.S.C. § 1382

§ 1382. Determination and collection of liability; notification of employer

When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part, shall—

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer.

29 U.S.C. § 1399(a), (b)

§ 1399. Notice, collection, etc., of withdrawal liability

(a) Furnishing of information by employer to plan sponsor

An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.

(b) Notification, demand for payment, and review upon complete or partial withdrawal by employer

(1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—

(A) notify the employer of—

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule.

(2)(A) No later than 90 days after the employer receives the notice described in paragraph (1), the employer—

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

(B) After a reasonable review of any matter raised, the plan sponsor shall notify the employer of—

(i) the plan sponsor's decision,

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

29 U.S.C. § 1401

§ 1401. Resolution of disputes

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of—

(A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or

(B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b)(1) of this title.

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator's fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

(3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that—

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings

(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring

an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this subchapter, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpena power), and enforced in United States courts as an arbitration proceeding carried out under title 9.

(c) Presumption respecting finding of fact by arbitrator

In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

(d) Payments by employer prior and subsequent to determination by arbitrator; adjustments; failure of employer to make payments

Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

(e) Furnishing of information by plan sponsor to employer respecting computation of withdrawal liability of employer; fees

If any employer requests in writing that the plan sponsor make available to the employer general information necessary for the employer to compute its withdrawal liability with respect to the plan (other than information which is unique to that employer), the plan sponsor shall furnish the information to the employer without charge. If any employer requests in writing that the plan sponsor make an estimate of such employer's potential withdrawal liability with respect to the plan or to provide information unique to that employer, the plan sponsor may require the employer to pay the reasonable cost of making such estimate or providing such information.

MOTION

(8) (8)

Nos. 86-231, 86-253

FILED

NOV 6 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PENSION BENEFIT GUARANTY CORPORATION

and

UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS
UNION LOCAL NO. 115 PENSION PLAN, *et al.*,
Appellants

v.

YAHN & MCDONNELL, INC. and
THE PENNSTAR COMPANY,
Appellees

**On Appeal from the United States Court of Appeals
for the Third Circuit**

MOTION TO AFFIRM

CARL L. TAYLOR
Counsel of Record
GLENN SUMMERS
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000

WILLIAM H. EWING
HANGLEY CONNOLLY EPSTEIN
CHICCO FOXMAN & EWING
1429 Walnut Street
14th Floor
Philadelphia, PA 19102
(215) 864-7700
Counsel for Appellees
Yahn & McDonnell, Inc. and
The Pennstar Company

Dated: November 6, 1986

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

Nos. 86-231, 86-253

PENSION BENEFIT GUARANTY CORPORATION
and
UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN, *et al.*,
Appellants
v.
YAHN & MCDONNELL, INC. and
THE PENNSTAR COMPANY,
Appellees

On Appeal from the United States Court of Appeals for the Third Circuit

MOTION TO AFFIRM

JURISDICTION

The judgment of the court of appeals (J.S. App. 50a-51a) was entered on March 31, 1986. A petition for rehearing filed by the Pension Benefit Guaranty Corporation ("PBGC"), which was allowed by the court below to intervene (J.S. App. 52a-53a), was denied on April 23, 1986 (J.S. App. 54a-55a). The PBGC filed a notice of appeal in No. 86-231 on May 21, 1986 (J.S. App. 56a-57a). On July 9, 1986, Justice Brennan extended the time for docketing the appeal to and including August 19, 1986, and the appeal was docketed on August 14, 1986. The appellants in No. 86-253, United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan, *et al.*, filed a notice of appeal on May 20, 1986, which was docketed on August 18, 1986.

The court below held that section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1401(a)(3)(A) (1982) is unconstitutional because it deprives the employer of "an impartial decisionmaker" (J.S. App. 21a) and thus falls foul of such decisions as *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), *Gibson v. Berryhill*, 411 U.S. 564 (1973), and *Tumey v. Ohio*, 273 U.S. 510 (1927), among others. Since an Act of Congress was held by the court below to be unconstitutional, the case falls squarely within the provision of 28 U.S.C. § 1252 (1982). Consequently, there is no basis to contest the jurisdiction of this Court if the question is a substantial one.

Because the decision below is in conflict with decisions of five other courts of appeals, and there are sharp divisions in the *en banc* review in two of these courts, the appellee does not feel that it can be seriously contended that the question is not substantial.

Accordingly, it appears that the Court has jurisdiction of the appeal.

MOTION TO AFFIRM

The question at issue in this case, though of constitutional dimension, is a relatively narrow one, and may not warrant plenary consideration in this Court. Nevertheless, it is a recurring question and should be definitively settled by a decision of this Court. Accordingly, the appellees move that the decision below should be affirmed.

The reasons for this motion are well stated by Judge Becker in his opinion for the majority below (*see* particularly, J.S. App. 18a-28a) and in the dissenting opinion of Judge Aldrich in *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137, 1148 (1st Cir. 1985). These opinions relied primarily on such cases as *Gibson v. Berryhill*, 411 U.S. 564 (1973), *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), and *Tumey v. Ohio*, 273 U.S. 510 (1927). *See also Schweiker v. McClure*, 456 U.S. 188 (1982); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *Friedman v. Rogers*, 440 U.S. 1 (1979).

In response to the decision below, the PBGC contends that pension plans can act impartially and may sometimes make decisions to reduce liability. However, the plan trustees "bear[] an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).[1] The legislative history demonstrates that Congress expected pension plans to act as ordinary litigants pursuing their statutory self-interest:

> We do not intend to restrict plan sponsors' prudent exercise of judgment in administering the withdrawal liability provisions generally. It is expected that plan trustees will need to make practical collection decisions which are consistent with their fiduciary duties and characteristic of any responsible creditor concerned with maximizing the total ultimate recovery at supportable costs. 126 Cong. Rec. 23,288 (1980) (remarks of Senator Williams, MPPAA co-sponsor).

That a "responsible creditor" acting "prudent[ly]" to "maximiz[e] the total ultimate recovery" may sometimes make decisions that lessen liability does not mean he may sit as judge on his own case.

The PBGC contends that the trustees cannot put their bias into effect, because some actuarial decisions are delegated to the plan actuary. It is hard to see how a defect in the statute can be cured by a further delegation to an entrepreneur who owes his appointment to the trustees. The PBGC's own source shows that there is great variation among actuaries on the critical actuarial assumptions, and a plan is free to shop for an actuary whose "philosophy" fits the plan's.[2]

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[1] Remarkably, neither the PBGC nor the Plan cited *Amax Coal* in their respective Jurisdictional Statements.

The PBGC contends that the plan cannot effectuate its bias in applying statutory exemptions, because legal determinations are not subject to the presumption. That begs the question. There is no basis in law or policy to shield the plan's factual determinations that underlie whether, on a case-by-case basis, a particular exemption does or does not apply.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

Carl L. Taylor
Counsel of Record
Glenn Summers
Kirkland & Ellis
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000

William H. Ewing
Hangley Connolly Epstein
Chicco Foxman & Ewing
1429 Walnut Street
14th Floor
Philadelphia, PA 19102
(215) 864-7700
Counsel for Appellees
Yahn & McDonnell, Inc. and
The Pennstar Company

Dated: November 6, 1986

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[2] General Accounting Office, Report to the Congress, Effects of Liabilities Assessed Employers Withdrawing From Multiemployer Pension Plans (1985), at 24. The Report also notes: "Notwithstanding the variables inherent in the determination of a plan's withdrawal liability, MPPAA provides that a plan's determination is presumed correct in disputes resulting in arbitration unless the employer can show that it is unreasonable or in error." *Id.*

APPELLANT'S BRIEF

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-231 ③

PENSION BENEFIT GUARANTY CORPORATION,
Appellant

v.

YAHN & MCDONNELL, INC. and THE PENNSTAR COMPANY,
Appellees

No. 86-253 ③

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS UNION LOCAL NO. 115
PENSION PLAN, ET AL.,
Appellants

v.

YAHN & MCDONNELL, INC. and
THE PENNSTAR COMPANY,
Appellees

On Appeal from the United States Court of Appeals
for the Third Circuit

BRIEF FOR THE APPELLANTS IN NO. 86-253

RICHARD H. MARKOWITZ
Counsel of Record
PAULA R. MARKOWITZ
R. DAVID WALK, JR.
Markowitz & Richman
121 South Broad Street
1100 North American Building
Philadelphia, PA 19107
(215) 875-3100

Dated: January 30, 1987

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTION PRESENTED

Section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §1401(a)(3)(A), provides that, after the trustees of a multiemployer pension plan have made an initial determination of an employer's liability upon withdrawal from the plan, their determination shall be accorded a presumption of correctness in any subsequent arbitration proceeding unless the employer shows by a preponderance of the evidence that the trustees' determination was unreasonable or clearly erroneous.

The question presented is whether Section 104(2) violates the Due Process Clause of the Fifth Amendment because of the supposed bias of the trustees.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the parties to this proceeding (No. 86-253) are Robert E. Zimmer, Michael Paolella, John P. Morris and James Smith, Jr., Trustees of the United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-231

PENSION BENEFIT GUARANTY CORPORATION,
Appellant
v.
YAHN & MCDONNELL, INC. and THE PENNSTAR COMPANY,
Appellees

No. 86-253

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS UNION LOCAL NO. 115
PENSION PLAN, ET AL.,
Appellants
v.
YAHN & MCDONNELL, INC. and
THE PENNSTAR COMPANY,
Appellees

On Appeal from the United States Court of Appeals
for the Third Circuit

BRIEF FOR THE APPELLANTS IN NO. 86-253

OPINIONS BELOW

The opinion of the court of appeals (PBGC JS[1] App. A, 1a-40a) is reported at 787 F.2d 128. The opinion of the district court (PBGC JS App. B, 41a-49a) is unreported.

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[1] References to "PBGC JS" are to the Jurisdictional Statement of the Pension Benefit Guaranty Corporation, No. 86-231 (filed August 14, 1986), which seeks review of the same judgment.

JURISDICTION

The judgment of the court of appeals (PBGC JS App. C, 50a-51a) was entered on March 31, 1986. The Pension Benefit Guaranty Corporation (PBGC), a wholly-owned government corporation and an agency of the United States, was granted leave to intervene post-judgment for the purposes of seeking rehearing and, if necessary, review in this court (PBGC JS App. D, 52a-53a). The PBGC's petition for rehearing was denied on April 23, 1986 (PBGC JS App. E, 54a-55a). The petition for rehearing of the United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan (the Plan), *et al.*, was also denied on April 23, 1986. (Plan JS App. A., A-1). The PBGC filed a notice of appeal to this Court on May 21, 1986 (PBGC JS App. F, 56a-57a). The Plan also filed a notice of appeal to this Court on May 21, 1986 (Plan JS App. B, A-2).

On December 1, 1986, the Court noted probable jurisdiction of the appeal of the PBGC (No. 86-231) and the Plan (No. 86-253). The Court also ordered the cases consolidated.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1252.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§1001 *et seq.*, are set forth at PBGC JS App. H, 60a-67a. The provision of the statute held unconstitutional by the court of appeals is Section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. §1401(a)(3)(A), which provides:

> For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

The constitutional provision involved is the Due Process Clause of the Fifth Amendment, which provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

The following statement is adopted from the statement in the Jurisdictional Statement of the PBGC.

A. The Statutory Background.

The history of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208, has been described in detail by this Court in *Connolly v. PBGC*, 106 S. Ct. 1018, 1021-1022 (1986), and *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 721-723 (1984). In brief, it became apparent to Congress that the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 *et seq.*, "did not adequately protect plans from the adverse consequences that resulted when individual employers terminate[d] their participation in, or [withdrew] from, multiemployer plans." *Gray*, 467 U.S. at 722. Congress further concluded that ERISA created undesirable incentives for employers to withdraw, leaving plans with inadequate funding. The absence of effective withdrawal liability provisions encouraged a "'last man out' mentality, with employers withdrawing from plans to avoid possible plan termination liability." 126 Cong. Rec. 20178 (1980) (remarks of Sen. Javits).

The MPPAA was designed primarily to discourage employer withdrawals from multiemployer pension plans, while at the same time not acting as a disincentive to new employers who might consider becoming contributors to such plans. *See* H.R. Rep. No. 869, Pt. II, 96th Cong., 2d Sess. 15 (1980); *Connolly*, 106 S. Ct. at 1021-1022; *Gray*, 467 U.S. at 721-723. As the Court stated in *Connolly*, the MPPAA "safeguards the participants in multiemployer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan." 106 S. Ct. at 1026. Thus, "the Act requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of vested benefits and the current value of the plan's assets." *Gray*, 467 U.S. at 725, quoted in *Connolly*, 106 S. Ct. at 1022. Various determinations made by the trustees in the process of collecting this debt are presumed correct under Section 104(2) of the MPPAA, 29 U.S.C. §1401(a)(3), "in order to ensure the enforceability of employer liability." H.R. Rep. No. 869, Pt. I, *supra*, at 86.

B. The Statutory Process For Determining Withdrawal Liability.

Withdrawal liability is an employer's statutory share of the pension plan's "unfunded vested benefits." 29 U.S.C. §1381(b). "Unfunded vested benefits" are "(A) the value of nonforfeitable benefits under the plan, less (B) the value of the assets of the plan." 29 U.S.C. §1393(c). The plan sponsor[2] determines the employer's share of unfunded vested benefits by using one of several allocation methods specified in 29 U.S.C. §1391. The "presumptive" or "basic" method of allocation, which was employed in this case, is set forth in Section 1391(b), and alternative allocation methods are set forth in Sections 1391(c)(2), (3) and (4). In addition, the Act permits the plan sponsor to use an allocation method of its own design, subject to the PBGC's approval based on the PBGC's determination that the plan's method will "not significantly increase the risk of loss to plan participants and beneficiaries or to the [PBGC]." 29 U.S.C. §1391(c)(5)(A).[3] The MPPAA requires that the allocation method applied to a specific withdrawal may not be different from the plan-wide method in effect on the date of that withdrawal, and the Act further requires uniform application to all withdrawing employers of whichever allocation method the plan sponsor has selected. 29 U.S.C. §1394. *See* H.R. Rep. No. 869, Pt. I, *supra*, at 85.

Under the presumptive method of allocation, the plan sponsor must determine a withdrawing employer's proportional share of each of three different categories of unfunded vested benefits. 29 U.S.C. §1391(b)(1)(A), (B) and (C). These shares are derived from fractions comparing the employer's contributions to the plan to the contributions made by all employers to the plan during the same periods. 29 U.S.C. §§1391(b)(2)(E)(ii), 1391 (b)(3)(B), 1391(b)(4)(D)(ii).

The amount of an employer's withdrawal liability also depends on the value of the plan's unfunded vested benefits (nonforfeitable benefits minus assets) that are subjected to the allocation process. In calculating the value of nonforfeitable benefits under a pension plan, it is necessary to use certain "actuarial assumptions and methods," which either must follow regulations that the PBGC is authorized to issue[4] or be "reasonable" and "offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. §1393(a).

---

[2] The "plan sponsor" of the multiemployer pension plan is defined in 29 U.S.C. §1301(a)(10)(A) as the plan's joint board of trustees.

[3] *See* H.R. Rep. No. 869, Pt. I, *supra*, at 77:

> The bill provides a basic method for determining an employer's withdrawal liability, three alternative methods which a plan may elect, and allows plans to develop additional allocation methods. The basic method[ ] is the one that applies unless a plan is amended to adopt a different method.

As soon as is practicable after an employer's withdrawal from a pension plan, the plan trustees must notify the employer of "the amount of the liability" and "the schedule for liability payments" and make demand for payment. 29 U.S.C. §1399(b)(1). The employer may then ask the plan trustees to review any specific matter relating to the determination of liability, may identify any inaccuracies in the determination, and may "furnish any additional relevant information." 29 U.S.C. §1399(b)(2)(A). The trustees must review the issues raised by the employer and notify the employer of their decision and the basis for it. 29 U.S.C. §1399(b)(2)(B).

The MPPAA also prescribes procedures to be followed if, after the above-described steps, a disagreement remains between the pension plan and the employer over any determination made by the plan trustees relating to the employer's withdrawal liability. 29 U.S.C. §1401. Either the employer or the plan may initiate arbitration, which must be conducted in "accordance with fair and equitable procedures" (29 U.S.C. §1401(a)(2)) that have been promulgated by the PBGC.[5] Section 1401(a)(3)(A) of the MPPAA, the provision found unconstitutional by the court of appeals, provides:

> For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

The Act also accords a presumption of correctness to the actuarial assumptions and methods used to determine a plan's unfunded vested benefits. 29 U.S.C. §1401(a)(3)(B).

Congress explained that "[t]hese [presumptions] are necessary in order to ensure the enforceability of employer liability. In the absence of these presumptions, employers could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination." H.R. Rep. No. 869, Pt. I, *supra*, at 86. *See also* Sen. Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *S. 1076: The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* 20-21 (Comm. Print 1980) [hereinafter cited as *Senate Labor Summary]*.[6] Finally, the MPPAA vests the federal district courts with jurisdiction to review the arbitrator's final decision. 29 U.S.C. §1401 (b)(2). In any such proceeding, "there [is] a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 29 U.S.C. §1401(c).

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[4] The PBGC has not yet decided whether to promulgate regulations concerning appropriate actuarial assumptions.

[5] *Arbitration of Disputes in Multiemployer Plans*, 50 Fed. Reg. 34679 (1985) (to be codified at 29 C.F.R. Pt. 2641).

[6] The *Senate Labor Summary* stated (at 20-21):

> The Committee includes the presumption to reduce the likelihood of dispute and delay over technical actuarial matters with respect to which there are often several equally "correct" approaches. Without such a presumption, a plan would be helpless to resist dilatory tactics by a withdrawing employer—tactics that could, and could be intended to, result in prohibitive collection costs to the plan. The presumption can be rebutted in those cases where injustice would otherwise result to the withdrawing employer.

C. The Facts Of This Case.

Yahn & McDonnell, Inc. (Yahn) entered into a series of collective bargaining agreements with United Retail and Wholesale Employees Teamsters Union Local No. 115 (the Union) (C.A. App. 15), the last of which was a three-year agreement executed in January, 1980 (C.A. App. 7, 15).[7] These collective bargaining agreements required Yahn to make contributions to the United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan (PBGC JS App. A, 6a).

The Pension Plan is a multiemployer pension trust established under Section 302 (c) (5) of the Labor Management Relations Act, 29 U.S.C. §186 (c) (5), and a "multiemployer plan" within the meaning of ERISA, 29 U.S.C. §1002 (37) (A) (C.A. App. 5). The Plan is administered by four trustees, two of whom were appointed by contributing employers and two of whom were appointed by the Union (PBGC JS App. A, 6a). The trustees are "fiduciaries" within the meaning of ERISA, 29 U.S.C. §1002 (21) (A).

Yahn made all of the contributions required by the collective bargaining agreements until November, 1981, when it ceased operations and withdrew from the Pension Plan (PBGC JS App. A, 6a). In April, 1982, the Plan issued a demand for payment of approximately $458,000 in withdrawal liability (*ibid.*).[8] In its demand for payment, the Plan stated, *inter alia*, that it had elected to use the presumptive method for determining Yahn's liability and that, "[u]nder this method, the Fund Actuary,

Peat, Marwick, Mitchell & Co., has determined the withdrawal liability of Yahn & McDonnell, Inc." (C.A. App. 46, 109).

In July, 1982, Yahn made a request for review of the liability determination (PBGC JS App. A, 7a). Yahn requested consideration of several specific issues, including the actuarial assumptions employed to calculate the Plan's unfunded vested benefits (C.A. App. 56). The trustees reviewed their initial assessment of liability at a meeting attended by counsel for the Pension Plan, counsel for Yahn, and two employees of Peat, Marwick, Mitchell & Co., the Plan's actuary (C.A. App. 102-116). At the conclusion of the trustees' review, Yahn was advised that the withdrawal liability assessment would not be altered (PBGC JS App. A, 7a).

Yahn invoked its right to arbitration, but the arbitration proceeding was placed in abeyance pending resolution of the constitutional issues raised by Yahn in this litigation (PBGC JS App. A, 7a). No arbitration proceeding has ever been conducted concerning Yahn's specific disagreements with the trustees' assessment of withdrawal liability.

The Pension Plan and its trustees commenced this action in the United States District Court for the Eastern District of Pennsylvania to collect Yahn's withdrawal liability (PBGC JS App. A, 7a). In its answer, Yahn raised numerous constitutional challenges to the MPPAA; among other things, Yahn asserted that the MPPAA denied it due process because the initial determination of liability was made by biased trustees (*ibid.*). After briefing, the district court upheld the MPPAA against all of Yahn's constitutional attacks, but dismissed the Plan's request for attorneys' fees, costs, and liquidated damages (PBGC JS App. B, 41a-49a).

Yahn appealed from the adverse judgment against it, and the Pension Plan appealed from the denial of attorneys' fees, costs, and liquidated damages. Relying on "Congress' obvious desire to ensure the solvency and stability of pension plans" (PBGC JS App. A, 12a), the court of appeals first affirmed the district court's ruling that the MPPAA authorizes the Plan to maintain an action to collect withdrawal liability payments pending arbitration. Thus, the court of appeals upheld the district court's award of interim liability payments to the Plan (*ibid.*). Second, the court of appeals agreed with the Plan that the MPPAA compels an award of attorneys' fees, costs, and liquidated damages upon a judgment in favor of a pension plan for delinquent payments. With respect to this issue, therefore, the court of appeals reversed the district court's ruling that such an award would be premature prior to arbitration (*id.* at 13a-14a).

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[7] The court of appeals' opinion incorrectly states that Yahn's last agreement with the Union was executed in December, 1980. *See* PBGC JS App. A, 6a.

[8] The Plan advised Yahn that the Plan reserved the right to look to Yahn's parent company, appellee Pennstar, for payment if Yahn could not afford to pay the withdrawal liability itself. *See* 29 U.S.C. §1301(b); PBGC JS App. A, 6a-7a & n.2.

Finally, in a divided decision, the court of appeals reversed that portion of the district court's judgment upholding the MPPAA against Yahn's procedural due process challenge. The court of appeals did not question the district court's conclusion that the statutory presumptions of correctness "survive a substantive due process analysis and a *Mathews* [*v. Eldridge*, 424 U.S. 319 (1976)] test" (PBGC JS App. A, 28a; *id.* at 32a-33a n.24), but it held that the district court erred in failing to analyze the alleged bias of the trustees separately from the adequacy of the procedural safeguards built into the review process (*id.* at 19a). Thus, the court of appeals analyzed Yahn's procedural due process claim under cases such as *Schweiker v. McClure*, 456 U.S. 188 (1982); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); and *Tumey v. Ohio*, 273 U.S. 510 (1927).

Although the court of appeals acknowledged (PBGC JS App. A, 16a) that its decision was contrary to that of every other circuit to consider the issue,[9] the court held that multiemployer pension plan trustees are "biased" in favor of maximizing collections of withdrawal liability because the trustees have fiduciary duties of loyalty to the plan under Section 404 of ERISA, 29 U.S.C. §1104, and may be subject to personal liability for violating those duties under Section 409 of ERISA, 29 U.S.C. §1109 (PBGC JS App. A, 21a-25a). The court further held that the trustees' "manifest and significant bias" (*id.* at 24a) was not cured by limits on the scope of their decisionmaking authority (*id.* at 25a-27a). Instead, the court was of the view that the trustees have broad discretion to (1) select from among four statutory methods, or their own method, for allocating withdrawal liability; (2) determine appropriate actuarial "discount rates"; and (3) determine the applicability of several statutory exemptions to the Act's withdrawal liability provisions (*ibid.*). Accordingly, the court concluded that the trustees' role is "adjudicative" because "[t]he trustees perform the judicial task of making *case-by-case determinations* significantly affecting the property of employers" and "must frequently make complex legal and factual determinations" (*id.* at 26a-27a n.18 (emphasis added)). Finally, the court held that the opportunity for further review — specifically, the right to invoke arbitration and review in federal district court — did not remove the taint of the trustees' bias because, under the statutory presumptions of correctness, any subsequent proceedings would themselves be tainted by the initial decision of the supposedly biased trustees (*id.* at 27a-28a).

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[9] *See Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Industry Pension Fund*, 762 F.2d 1137 (1st Cir. 1985) (en banc); *Bd. of Trustees v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2116 (1985); *Washington Star Co. v. Int'l Typographical Union Negotiated Pension Plan*, 729 F.2d 1502 (D.C. Cir. 1984); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843 (2d Cir.), *cert. denied sub nom. Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers Int'l*, 467 U.S. 1259 (1984); *Republic Industries, Inc. v. Teamsters Joint Council No. 83*, 718 F.2d 628 (4th Cir.), *cert. denied*, 467 U.S. 1259 (1984).

For relief, the court of appeals determined that the statutory presumption of correctness accorded the trustees' liability determinations in arbitration could be severed from the remainder of the statute (PBGC JS App. A, 28a-33a).[10] Thus, the court rewrote the statute to require de novo determinations of withdrawal liability in arbitration proceedings. Such de novo proceedings, the court held, would satisfy the constitutional requirement of an impartial decisionmaker (*id.* at 31a-32a).[11]

Judge Seitz dissented from the majority's resolution of the constitutional question. He took issue with the court's view of the breadth of discretion available to the trustees in making determinations of withdrawal liability (PBGC JS App. A, 35a-39a), concluding that "whatever residual discretion the trustees enjoy is [not] inconsistent with due process" (*id.* at 39a). Judge Seitz also expressed concern that the court's invalidation of the statutory presumption of correctness "promises to frustrate severely the congressional enforcement scheme. Without the presumption the plan may well, as Congress feared, 'be helpless to resist dilatory tactics by a withdrawing employer — tactics that could, and could be intended to, result in prohibitive collection costs to the plan'" (*id.* at 40a (quoting *Senate Labor Summary* 21)).

The PBGC's and the Plan's petitions for rehearing en banc were denied over the dissenting votes of four judges (PBGC JS App. E, 54a-55a; Plan JS App. A, A-1).

SUMMARY OF ARGUMENT

The court of appeals erred in determining that pension plan trustees are impermissibly biased against withdrawing employers and in concluding that the presumption of correctness accorded to their decisions violates the Due Process Clause. Trustees would not satisfy their fiduciary duties, as the court of appeals erroneously assumed, by assessing the maximum withdrawal liability against withdrawing employers; instead, they have an obligation to make equitable assessments of withdrawal liability. Moreover, the decisions made in assessing withdrawal liability are not adjudicative decisions over which the trustees have significant discretion. The decisions at issue are made, in reality, by impartial decisionmakers.

The Due Process Clause is not violated by deferring to the decisions of private trustees. Decisions of trustees are ordinarily presumed correct under the well-established arbitrary and capricious standard, as are the decisions of other private parties, without raising due process concerns. The statutory presumption merely places a particular burden of proof on one party and upholds the decisions of trustees only if they are reasonable. The presumption thereby effectuates the congressional purpose of preserving the fiscal integrity of multiemployer pension plans; the alternative — de novo review — would threaten the financial soundness of those plans.

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[10] The court of appeals struck down only subparagraph (A) of Section 1401(a)(3), which accords a presumption of correctness to the trustees' determinations of liability and their application of various exemptions and mitigating provisions authorized by the Act. However, in its discussion of specific decisions purportedly made by the trustees, the court appeared to find that the selection of actuarial assumptions posed the greatest risk of harm to withdrawing employers (PBGC JS App. A, 18a, 26a). Yet the court did not in terms invalidate the presumption of correctness contained in subparagraph (B) of Section 1401(a)(3), which applies expressly to actuarial assumptions.

[11] Upon learning that the court of appeals had held a provision of the MPPAA unconstitutional, the PBGC filed a motion to intervene for the purposes of seeking rehearing and further review, if necessary, in this Court. The court of appeals granted the PBGC's motion to intervene (PBGC JS App. D, 52a-53a), but it denied rehearing (PBGC JS App. E., 54a-55a).

ARGUMENT

The heart of the court of appeals' holding that Section 1401 (a)(3)(A) is unconstitutional is its determination that pension fund trustees are impermissibly biased, as a matter of law, against withdrawing employers, and that the statutory presumption of correctness accorded to their decisions violates the Due Process Clause. In reaching this result, the court of appeals did not utilize the standards established by this Court to be used in evaluating whether or not a decisionmaker is impermissibly biased. In addition, the court of appeals erred in determining that pension fund trustees are biased against withdrawing employers. Application of the appropriate legal standards to a more realistic evaluation of the role of trustees demonstrates that those trustees cannot be considered biased, as a matter of law, and that Section 1401 (a)(3)(A) does not violate the Due Process Clause.

A. The Appropriate Constitutional Test For Decisionmaker Bias.

The seminal case for determining whether a judicial officer is impermissibly biased is *Tumey v. Ohio,* 273 U.S. 510 (1927). At issue in *Tumey* were state statutes that provided for trial of criminal charges by the mayor of the village where the crimes were committed. The mayor was vested with the authority to determine the guilt or innocence of an accused person and to order the imposition of a fine against the criminal defendant. In addition to his normal salary, the mayor received compensation from his service as a judge in two ways: first, the mayor received fees taxed against the defendant, but only if the defendant was convicted. Second, the mayor's village received a substantial portion of the fines assessed by him.

The Court first noted that "[a]ll questions of the judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." 273 U.S. at 523. However, the Court found that a criminal defendant is deprived of due process of law if the judge "has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Id.* The Court then found that the mayor had a direct, personal, pecuniary interest in convicting and fining criminal defendants because the mayor received payments if, and only if, the defendant was convicted.

Subsequent cases have affirmed that persons with a direct pecuniary interest in a case cannot sit in an adjudicative capacity on that case. In *Gibson v. Berryhill,* 411 U.S. 564 (1973), the district court held that members of the State Board of Optometry were so biased by personal pecuniary interest that they could not, consistent with the Due Process Clause, conduct hearings to determine whether other optometrists in competition with them should lose their licenses. This Court first stated: "It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate those disputes." *Gibson v. Berryhill,* 411 U.S. at 579. The Court then deferred to the conclusion of the district court, with its superior understanding of local matters, that the pecuniary interests of the board members were substantial enough to render them impermissibly biased.

Most recently, in *Aetna Life Insurance Company v. Lavoie,* 106 S. Ct. 1580 (1986), this Court reaffirmed that a judicial officer with a direct financial stake in the outcome of a case could not sit in judgment on that case. In *Aetna Life,* the Alabama Supreme Court issued a 5-4 decision that clarified a previously unsettled area of the law and upheld an award of $3.5 million in punitive damages. However, one of the parties then discovered that

Alabama Supreme Court Justice Embry, voting in the majority in *Aetna Life*, was a plaintiff in a separate lawsuit that sought compensatory and punitive damages. That suit relied on the same legal theory first approved by the Alabama Supreme Court in *Aetna Life*.

Aetna Life then contended that the Alabama Supreme Court's decision should be overturned because Justice Embry's financial interest in the separate lawsuit denied it the right to an impartial decisionmaker. The Court first rejected the claim that Justice Embry's personal hostility towards insurance companies was sufficiently substantial bias to establish a constitutional violation. 106 S. Ct. at 1585. This Court then found that Justice Embry had a substantial pecuniary interest in reaching the result he did because the decision would favorably affect his pending lawsuit on an identical claim.

The Court distinguished the situation of the other justices of the Alabama Supreme Court, who were only potential class members in Justice Embry's suit. The Court found that although they might have a pecuniary interest in the suit, their interest was too slight and insubstantial to warrant the finding that they were not impartial decisionmakers. 106 S. Ct. at 1588. The Court acknowledged that evaluating the allegedly biasing interests of a decisionmaker involves matters of degree, and the amount of disqualifying bias " 'cannot be defined with precision.' " 106 S. Ct. at 1585 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Instead, bias must be evaluated on a case-by-case basis: "At some point '[t]he biasing influence . . . [will be] too remote and insubstantial to violate the constitutional constraints.' " 106 S. Ct. at 1588 (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980)).

Where the pecuniary interest of the decisionmaker has been less direct, this Court has found that the decisionmaker is less likely to be impermissibly biased. For example, in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), an assistant regional administrator of the Department of Labor's Employment Standards Administration assessed a fine of $103,000.00 against Jerrico, Inc. The complaining party had an opportunity for a hearing before an administrative law judge, who reduced the fine. Jerrico then brought suit, alleging that this procedure violated the Due Process Clause because of the risk of bias inherent in an employee of the Employment Standards Administration assessing fines that would be used to fund the agency's budget. The Court found that the Due Process Clause was not violated by this procedure for two reasons: first, the assistant regional administrator, in assessing fines, was acting more in a prosecutorial capacity than in a judicial capacity. 446 U.S. at 243. Second, the biasing influence of the eventual receipt of fines by his agency was "too remote and insubstantial" to violate the Constitution. *Id.*

More recently, in *Schweiker v. McClure*, 456 U.S. 188 (1982), this Court upheld, against a challenge under the Due Process Clause, a procedure established by Congress to provide hearings on disputed claims for certain Medicare payments. The hearings were held by employees of private insurance carriers, and claimants did not have a right of appeal. 456 U.S. at 189. The Court first described the appropriate steps to be used in analyzing a claim that the hearing officers were impermissibly biased:

> As this Court repeatedly has recognized, due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities. We must start, however, from the presumption that the hearing officers who decide Part B claims are unbiased. This presumption can be rebutted by a showing of conflict of interest or some other specific reason for

> disqualification. But the burden of establishing a disqualifying interest rests on the party making the assertion. 456 U.S. at 195-96 (citations and footnote omitted).

The Court then found that there was no evidence in the record of an actual conflict of interest. The Court stated that "generalized assumptions of possible interest" were insufficient to demonstrate bias. 456 U.S. at 196. The Court then rejected an attempt to add an additional level of de novo review to the procedure established by Congress, stating:

> "[D]ue Process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). We have considered appellees' claims in light of the strong presumption in favor of the validity of congressional action and consistently with this Court's recognition of "congressional solicitude for fair procedure. . . ." *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979). Appellees simply have not shown that the procedures prescribed by Congress and the Secretary are not fair. 456 U.S. at 198.

These cases, read together, set forth standards to be used to evaluate whether a due process violation exists. First, there is a "strong presumption" in favor of procedures established by Congress. *Schweiker v. McClure*, *supra*, 456 U.S. at 198; *see also Mathews v. Eldridge*, 424 U.S. 319, 349 (1976); *Walters v. National Association of Radiation Survivors*, 105 S. Ct. 3180, 3188-89 (1985). Second, there is a presumption that decisionmakers themselves are unbiased. *Schweiker v. McClure*, 456 U.S. at 195. Third, the party alleging a due process violation has the burden of presenting substantial evidence of decisionmaker bias. *Id.* Fourth, since due process is a flexible concept, *Morrissey v. Brewer*, 408 U.S. at 481, a determination whether a decisionmaker is biased will depend on the facts of each case, for not every possibility of interest in the case warrants a finding of a due process violation. *See Aetna Life Insurance Co. v. Lavoie, supra*. In particular, a direct pecuniary interest of the individual decisionmaker is much stronger evidence of an impermissible bias than an indirect institutional interest. *Compare Aetna Life Insurance Co. v. Lavoie, supra, with Marshall v. Jerrico, Inc., supra*, and *Schweiker v. McClure, supra*. Finally, the function of the decisionmaker must be scrutinized to determine whether he or she is acting in a judicial capacity, since the test for decisionmaker bias only applies to adjudicative decisions. *Marshall v. Jerrico, Inc.*, 446 U.S. at 243.

B. The Court Of Appeals Erroneously Concluded That Trustees Are Inevitably Biased.

In the first part of its due process analysis, the court of appeals found that pension fund trustees are impermissibly biased, as a matter of law. Because Yahn raised a facial constitutional challenge to the MPPAA, the court of appeals, quite properly, did not base this conclusion on evidence in the record that the Plan's trustees, or trustees in general, are biased against withdrawing employers. Instead, the court made findings of bias based upon its evaluation of the legal status and duties of trustees. However, the court did not consider all relevant factors in determining whether trustees are biased, but erroneously focused on one allegedly biasing consideration to the exclusion of countervailing factors. A careful reading of the court's analysis reveals that it is fundamentally flawed in its reasoning and in its failure to utilize the correct standards for evaluating the bias of decisionmakers.

The court of appeals correctly recognized that a presumption exists that decisionmakers are unbiased, and that the presumption can be rebutted by a showing of a conflict of interest. The primary conflict of interest identified by the court was the following: "[A]s fiduciaries of the plan, trustees have a natural inclination and may even consider it a duty to maximize the fund by extracting as much money as possible from withdrawing employers." (PBGC JS App. A, 21a). The court held that this alleged conflict was an adequate showing of bias, unless countervailing factors were shown.

The court buttressed its conclusion by finding that the trustees had potential personal liability to the Plan under 29 U.S.C. §1109 (PBGC JS App. A, 22a). The court of appeals misunderstood the extent of their potential personal liability, for it later referred to the trustees' "consequent personal liability if the plan is not adequately funded. . . ." (PBGC JS App. A, 24a). Of course, trustees are not personally liable merely because the plan is not fully funded; liability only attaches if the trustees breach their fiduciary duties. *See* 29 U.S.C. §1109(a).

What apparently underlies the cout of appeals' statements about the personal liability of plan trustees is its belief that trustees face the possibility of being held personally liable to the plan if they do not assess the maximum withdrawal liability against employers. The legislative history of the MPPAA reveals that this concern is groundless. The House Report specifically states that an assessment of less than the maximum possible withdrawal liability is *not* a breach of fiduciary duty:

> Plan fiduciaries are given a great deal of flexibility to strike a balance among the competing considerations of encouraging new entrants, discouraging withdrawals, easing administrative burdens, and protecting the financial soundness of a fund. *The committee wishes to make it clear that in choosing the rules that would eliminate or reduce liability, the choice of such a rule is not per se a violation of a fiduciary standards;* the determination must be made as to whether the fiduciary has acted reasonably and in the interest of plan participants and beneficiaries and otherwise in accordance with the fiduciary standards. H.R. Rep. No. 869, Pt. I, 96th Cong., 2d Sess. 67 (1980) (emphasis added).

Thus, trustees do not face personal liability for failure to maximize withdrawal liability. Their judgments as to withdrawal liability are evaluated with the deferential "arbitrary and capricious" standard used to evaluate decisions concerning the fund. *See* pages 27-29 *infra*. The court of appeals erred in determining that trustees are biased by the fear of potential personal liability.

The court's finding that trustees are biased by a supposed duty to the fund to maximize withdrawal liability was also erroneous. In fact, trustees must consider many different, competing factors in assessing withdrawal liability, as Congress found in the passage quoted above. The overriding purpose is *not* to assess the maximum withdrawal liability, but to choose the course of action that is in the best interests of the fund. As the Court of Appeals for the First Circuit held in *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137 (1985) (en banc), trustees "would not meet their fiduciary duty to the fund, for example, if they set excessively high withdrawal liabilities which would have the effect of discouraging future participation." 762 F.2d at 1142-43. Instead, Congress has directed that trustees must consider all relevant factors and "develop an allocation method which meets the basic purpose of withdrawal liability *and is equitable to contributing employers*." H.R. Rep. No. 869, Pt. I, 96th Cong., 2d Sess. 73 (1980) (emphasis added). Thus, it is the fiduciary duty of trustees to be equitable to employers and consider what assessment is best for the plan.

The court of appeals dismissed this showing by stating: "The due process right to an unbiased decisionmaker is not satisfied by speculation that countervailing concerns may restrain clearly biased parties from excessively harsh judgments." (PBGC JS App. A, 23a) (footnote omitted). This statement is internally inconsistent with the court's earlier statement that trustees were considered biased because of their duty to maximize withdrawal liability "[a]bsent countervailing factors." (PBGC JS App. A, 21a). More importantly, it is incorrect to discount a factor showing a lack of bias; the proper approach is to consider whether all relevant factors amount to evidence sufficient to rebut the presumption of lack of bias.

If all factors concerning the trustees' interests are evaluated, the conclusion is evident that trustees are not impermissibly biased against withdrawing employers. Initially, it is important that the trustees do not have any *personal* interests that would render them biased.[12] Instead, they have only *institutional* interests based upon their duty of loyalty to the plan. As Congress found, in the passage quoted above, the plan's interests include encouraging new entrants, easing administrative burdens, and protecting the fiscal integrity of the plan. These interests are served by being equitable to employers, as Congress suggests, because an equitable plan would attract new contributors, and equitable assessments would minimize the amount of challenges, and resulting litigation, brought by withdrawing employers against their assessments. Finally, if the plan provides for equitable withdrawal liability assessments, then employers will be less likely to seize upon the first opportunity to withdraw from a plan. In sum, the institutional interests of plan trustees do not require them to be biased against withdrawing employers.

When considered in light of the procedural due process principles established by this Court, the interests of trustees are insufficient to render them impermissibly biased decisionmakers. The trustees do not have disqualifying personal loyalties, but only institutional loyalties that are required by Congress. The trustees are not obligated to maximize withdrawal liability, but to make equitable assessments. It follows that the court of appeals erred in finding that trustees are inevitably biased against withdrawing employers,[13] given the "strong presumption" in favor of procedures established by Congress, *Schweiker v. McClure*, 456 U.S. at 200, and the presumption that decisionmakers are unbiased. *Id.* at 195.

C. Multiemployer Pension Plan Trustees Do Not Act As Adjudicative Decisionmakers When They Calculate Withdrawal Liability.

As this Court recognized in *Marshall v. Jerrico, Inc.*, *supra*, a functional analysis of the decisionmaker's role is necessary because only quasi-judicial or adjudicative decisions can be challenged as impermissibly biased. The court of appeals found that three different types of decisions made by the trustees were subject to their allegedly disabling bias: the choice of an allocation method, the choice of actuarial assumptions, and the decision to grant any of the statutory exemptions. However, these decisions are not adjudicative in nature. In making each of these decisions, the trustees' discretion is either severely limited or subject to independent review, so that any bias that does exist is irrelevant.

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[12] For this reason, the court of appeals' reliance, *see* PBGC JS App. A, 23a-24a, on *Gibson v. Berryhill*, 411 U.S. 564 (1973), and on certain language in *Friedman v. Rogers*, 440 U.S. 1 (1979), is misplaced. Those decisions concerned allegations that decisionmakers had personal, financial stakes in the outcome of cases before them. Pension plan trustees do not have any personal, financial stakes in the determination of withdrawal liability.

The court of appeals also relied upon *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), as supporting its decision. While *Ward* affirms the right to an impartial decisionmaker established in *Tumey v. Ohio*, *supra*, its holding does not control this case. In *Ward*, the mayor of Monroeville sat as a judge of ordinance violations and traffic offenses, with the power to adjudge guilt and levy fines on defendants. The mayor also had executive responsibility for village finances, and the revenues derived from the fines, costs and fees assessed in the mayor's court were a "major part" of the village's income — close to 50%. 409 U.S. at 58. Thus, the mayor had an unequivocal bias, with no countervailing interests, in favor of convicting criminal defendants and assessing the maximum possible fines. Pension plan trustees, by contrast, do not have an unequivocal interest in assessing the maximum withdrawal liability.

[13] Of course, withdrawing employers are free to show, in individual cases, that the trustees were impermissibly biased against them.

The trustees choose an allocation method by either selecting one of four methods prescribed by Congress in the MPPAA or using a method of their own design, which must be approved by the PBGC. If the trustees do not select a method, then they must use the "basic" or "presumptive" method, which is the method used by the trustees in this case. Once a method is selected, the trustees must apply it uniformly to all withdrawing employers. The trustees cannot change the allocation method to be used for a specific withdrawal: unless the employer consents, the plan must use the method in effect on the date of the withdrawal. *See* 29 U.S.C. §1394(a); H. R. Rep. No. 869, Pt. I, 96th Cong., 2d Sess. 85 (1980). As Judge Seitz noted in his dissent in the court of appeals: "Thus, when Yahn withdrew from the pension plan, the trustees simply had no choice about which method to employ: either the method specified by amendment, or — if the plan was never amended — the presumptive method." (PBGC JS App. A, 36a).

The choice of allocation method is not the type of decision contemplated by the due process analysis. First, this decision is legislative in nature, not adjudicative, because the allocation method is a rule chosen to apply to all withdrawing employers and cannot be changed on a case-by-case basis. The impartial decisionmaker requirement does not apply to this sort of legislative function. *See Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980); *see also* PBGC JS App. A, 36a (Seitz, J., dissenting). Surely the Due Process Clause would not be violated if the mayor of Monroeville promulgated an executive order, applicable to all future violators, that set high fines for traffic violations, even if the mayor's purpose was to maximize village revenues.

Second, the scope of the discretion exercised by the trustees in selecting an allocation method is too narrow to raise due process concerns. Trustees can ony choose one of four methods prescribed by Congress. It is not disputed in this case that those methods are fair. If the trustees design their own method, that method must be approved by an impartial third party, the PBGC. The real decisionmaker in designing allocation methods is an impartial one, not the trustees. Due process is not violated merely because the trustees may choose which of several fair methods is to be used.

The second type of decision found by the court of appeals to be influenced by bias is the choice of actuarial assumptions used for actually calculating the withdrawal liability. That choice, however, is made by the plan's actuary, which is a neutral decisionmaker, governed by ethical and professional standards. The assumptions selected by the actuary must be "reasonable" and "offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. §1393(a). There is no reason to believe that plan actuaries in general, or this Plan's actuary, Peat, Marwick, Mitchell & Co., would be biased against either withdrawing employers or any particular withdrawing employer. Obviously, the withdrawing employer would be free to make that showing in a particular case, but for the purpose of facial constitutional analysis, pervasive or institutional bias on the part of actuaries cannot be shown to exist.[14]

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[14] Although trustees are not bound to accept assumptions recommended by the actuary, the fact that the trustees rejected their own actuary's recommendations would be powerful evidence in an

An arbitrator's deference to the reasonable decisions of the plan's actuary does not violate the Due Process Clause. Because the actuarial assumptions selected by the actuary are based upon "the actuary's best estimate of anticipated experience under the plan," the actuary must take into account a complex series of factors concerning the plan, such as the available data concerning plan participants, anticipated rates of return on the plan's investments, the plan's investment policy, and the actuary's projection of economic conditions. Obviously, the plan's actuary is in the best position to assemble the relevant information and assess these factors. By its very nature, the determination of actuarial assumptions is a "best estimate," and another actuary might reach a different estimate. The estimations inherent in setting actuarial assumptions can be second-guessed, as economic projections cannot be conclusively proven. *See Senate Labor Summary* 20-21. The MPPAA merely recognizes that in this situation, the estimate of the plan's actuary is the most reliable and accurate, as long as it is reasonable. The Due Process Clause is not violated because deference is given to the reasonable judgments of the person in the best position to make them.

The third type of allegedly biased decision made by trustees is whether any of the statutory exemptions apply. The court of appeals found that the trustees' supposed bias would affect their decision to find a withdrawing employer exempt. Even assuming, *arguendo*, this is true, the bias would be meaningless because decisions as

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arbitration hearing that the assessment of withdrawal liability was unreasonable. *See Keith Fulton*, 762 F.2d at 1141 n.3 (citing *Woodward Sand Co. and Operating Engineers' Pension Trust*, 3 EBC (BNA) 2351 (1982) (Kaufman, Arb.)); PBGC JS App. A, 38a & n.3. As a practical matter, the trustees are likely to follow their actuary's recommendation or risk having the assessment overturned as unreasonable by an arbitrator.

to the applicability of statutory exemptions would be reviewed de novo. The PBGC has concluded that legal determinations made by the trustees are not presumed correct in arbitration. PBGC JS at 21. The Plan agrees with the PBGC that the presumption of correctness in Section 1401(a)(3)(A) does not apply to legal questions decided by the trustees.[15] Thus, to the extent that the court of appeals relied upon the trustees' alleged bias in applying statutory exemptions to find Section 1401(a)(3)(A) unconstitutional, the court of appeals erred.

D. The Presumption Of Correctness Accorded To Trustees' Assessments Of Withdrawal Liability Is Consistent With The Arbitrary And Capricious Standard Used To Evaluate Decisions By Trustees.

The foundation of the court of appeals' finding of a due process violation is that it is inappropriate to accord a presumption of correctness to the decision of trustees because they are not neutral and detached. Instead, the court of appeals would have trustees' withdrawal liability assessments reviewed de novo. However, the standard of review at issue in this case is the conceptual equivalent of the well-established arbitrary and capricious standard used to evaluate all trustees' decisions concerning a pension plan.

When it enacted ERISA, Congress did not explicitly specify the standard of review to be used to evaluate decisions made by trustees of ERISA funds. This Court has recognized that Congress intended to invoke and adopt the common law of trusts to define the powers and duties of trustees. *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 105 S. Ct. 2833, 2840 (1985). Although this Court has not specifically addressed the question, the lower federal courts unanimously agree that as part of its adoption of the common law of trusts, Congress intended that trustees' decisions would be evaluated under the deferential "arbitrary and capricious" standard. *See Stewart v. National Shopmen Pension Fund*, 795 F.2d 1079, 1083 (D.C. Cir. 1986); *Jestings v. New England Telephone and Telegraph Co.*, 757 F.2d 8, 9 (1st Cir. 1985); *Morse v. Stanley*, 732 F.2d 1139, 1145 (2d Cir. 1984); *Wolf v. National Shopmen Pension Fund*, 728 F.2d 182, 187 (3d Cir. 1984); *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1006 (4th Cir. 1985); *Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357, 362 (5th Cir. 1981), *cert. denied*, 454 U.S. 836 (1981); *Crews v. Central States, Southeast and Southwest Areas Pension Fund*, 788 F.2d 332, 336 (6th Cir. 1986); *Wardle v. Central States, Southeast and Southwest Areas Pension Fund*, 627 F.2d 820, 824 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *Bueneman v. Central States, Southeast and Southwest Areas Pension Fund*, 572 F.2d 1208, 1209 & n.3 (8th Cir. 1978); *Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133, 1135 (9th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *Carter v. Central States, Southeast and Southwest Areas Pension Fund*, 656 F.2d 575, 576 (10th Cir. 1981); *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1530-31 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 410 (1985); *see generally* Comment, *The Arbitrary and Capricious Standard Under ERISA: Its Origins and Application*, 23 Duq. L. Rev. 1033 (1985).

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[15] *Cf. Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133, 1135 (9th Cir. 1984) (under the arbitrary and capricious standard, trustees' decisions on questions of law can be overturned if simply "erroneous"), *cert. denied*, 469 U.S. 1189 (1985); *Washington Post v. Washington-Baltimore Newspaper Guild, Local 35*, 787 F.2d 604, 606 (D.C. Cir. 1986) (despite deference normally given to decisions of labor arbitrators, their decisions on questions of statutory construction are reviewed de novo).

Under the arbitrary and capricious standard, as with the standard for reviewing withdrawal liability assessments, there is no opportunity for a de novo hearing. *See, e.g., Wardle v. Central States, Southeast and Southwest Areas Pension Fund*, 627 F.2d at 824; *Carter v. Central States, Southeast and Southwest Areas Pension Fund*, 656 F.2d at 576; *Crews v. Central States, Southeast and Southwest Areas Pension Fund*, 788 F.2d at 336. Like the decisions of an administrative agency, the decisions of trustees receive limited review, "taking into account the expertise of professionals operating in a complex field. Courts will substitute their judgment for that of trustees only if the trustees' actions are not grounded on any reasonable basis. Choices between reasonable alternatives, it follows, are for the trustees, not the courts." *Stewart v. National Shopmen Pension Fund*, 795 F.2d at 1083. "[T]he standard exists to ensure that administrative responsibility rests with those whose experience is daily and continual, not with judges whose exposure is episodic and occasional." *Berry v. Ciba-Geigy Corp.*, 761 F.2d at 1006.

Although the Section 1401(a)(3)(A) standard is described differently from the arbitrary and capricious standard, the two standards are essentially equivalent. Both standards presume that the trustees' decisions are correct and place the burden of proof on the objecting party. Both standards require a reviewing court to uphold the choices of the trustees between reasonable alternatives. Finally, under both standards the trustees are permissibly "biased", *i.e.*, their decisions are controlled by their duty of loyalty to the plan.

The point of demonstrating that the two standards are fundamentally equivalent is this: it is beyond dispute that the well-established arbitrary and capricious standard does not violate the due process rights of persons challenging plan decisions, such as a denial of an application for benefits from the fund. Plan beneficiaries do not receive a hearing before an impartial decisionmaker, and yet their entitlement to important property rights, such as pension rights, can be adjudged without any right to de novo review of that decision. In both situations, the partiality of the trustees does not constitute a due process violation because whatever bias exists is a permissible type of bias.

The bias of the trustees is permissible because the trustees are obligated by Congress to be biased in favor of pension plans. This "bias" mirrors the "bias" of the MPPAA. The primary concern of Congress in enacting the MPPAA was to insure the financial soundness of multiemployer pension plans and alleviate the problem of employer withdrawal from those plans. *See Connolly v. PBGC*, 106 S. Ct. 1018, 1020-22 (1986); *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 721-23 (1984). While the effect of the MPPAA is to benefit multiemployer plans at the expense of withdrawing employers, this Court has held that the MPPAA is not, for that reason, unconstitutional. *Connolly*, 106 S. Ct. at 1024-26. By its very nature, an assessment of withdrawal liability is intended to benefit the interests of the plan over those of a withdrawing employer. Thus, it is entirely appropriate that the trustees assess withdrawal liability and that their judgments are presumed correct, for what is at issue is what is best for the plan. Put another way, the alleged "bias" of the trustees is identical to the "bias" of Congress in enacting the MPPAA and the "bias", or purpose, of the statute itself — namely, to insure the integrity of pension plans. The procedure for assessing withdrawal liability effectuates Congress' purpose in enacting the MPPAA by deferring to decisions of the persons best able to judge what is best for the plan. In short, because the MPPAA and the assessment of withdrawal liability are intended to serve pension plans, the trustees' loyalty to those plans is not an *impermissible* bias.

Moreover, the presumption of correctness attached to trustees' decisions is not unique. An analogous presumption exists in the field of labor law. A union's decision not to process a member's grievance to arbitration is not reviewed de novo. Instead, the union's decision that the grievance lacked merit is presumed correct and can only be challenged if the member can show that the

union acted arbitrarily, discriminatorily, or in bad faith in refusing to press the grievance. *See Vaca v. Sipes*, 386 U.S. 171, 190-94 (1967); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). This Court has repeatedly reaffirmed the validity of the *Vaca v. Sipes* standard, *see Clayton v. United Automobile Workers*, 451 U.S. 679 (1981); *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983); *Bowen v. United States Postal Service*, 459 U.S. 212 (1983), without a suggestion that the member's due process rights might be violated by deferring to the union's decision. As with decisions by pension fund trustees, courts defer to the decisions of unions because that deference effectuates important federal policies, namely, those that favor the resolution of labor-management disputes through grievance and arbitration procedures and the primary responsibility of the collective bargaining representative to negotiate and resolve those disputes. *See Vaca v. Sipes*, 386 U.S. at 191-94. Similarly, the presumption of correctness given to decisions by plan trustees promotes federal policies that favor the fiscal integrity of pension plans and disfavor judicial interference into the management of those plans.

In addition to their role in promoting federal policies, these presumptions of correctness — the arbitrary and capricious standard, the *Vaca v. Sipes* standard, and the standard applicable to withdrawal liability assessments — are all constitutional because they are only evidentiary presumptions. The presumptions merely place the burden of proof on a particular party and establish the legal standard that must be satisfied by that party. These presumptions are constitutional because the burden of proof can be satisfied and the presumptions can be rebutted. Withdrawing employers receive due process because they do have the opportunity for hearings in which they can prevail if they satisfy their burden of proof. The mere fact that a particular burden is placed on them does not violate the Constitution.

E. The Court of Appeals' Ruling That Assessments Of Withdrawal Liability Are To Be Determined De Novo By An Arbitrator Would Threaten The Financial Stability Of Pension Funds.

The court of appeals' solution to the defect it perceived in the MPPAA was to rule that arbitrators should decide the proper amount of withdrawal liability de novo. As Judge Seitz noted in dissent, this decision "is an open invitation to proliferated and expanded arbitration proceedings." (PBGC JS App. A, 35a). A problem of this magnitude cannot be lightly disregarded. Withdrawing employers who object to their assessments of liability will be able to force a lengthy hearing on the proper determination of withdrawal liability. The arbitrator will need to be educated about every aspect of the fund in order to understand the plan's withdrawal liability requirements. For example, because actuarial assumptions are supposed to "offer the actuary's best estimate of anticipated experience under the plan," 29 U.S.C. §1393(a), the arbitrator would have to be informed of the plan's entire experience. To present its case, each side would have to hire experts and incur large attorneys' fees. The plan would then be subject to an arbitrator's independent determination of withdrawal liability.

In addition to the immediate and substantial costs of the arbitration hearing, there is no guarantee that an arbitrator considering the assessment of a second withdrawing employer will make an assessment that is consistent with the first arbitrator's decision. As a result, the plan may lack the consistency and predictability that is essential to good financial management.

The inevitable result of this change in procedures is to harm the financial soundness of multiemployer plans, contrary to the will of Congress in enacting the MPPAA. Withdrawing employers will be able to use the threat of lengthy, costly arbitration hearings to force plans to accept smaller withdrawal liability assessments than they would be entitled to receive. If the plans choose not to accept such low settlement offers, they would "be helpless to resist dilatory tactics by a withdrawing employer — tactics that could, and could be intended to, result in prohibitive collection costs to the plan." *Senate Labor Summary* at 21 (quoted in *Keith Fulton*, 762 F.2d at 1143 n.7). Congress found that the presumption of correctness was "necessary in order to ensure the enforceability of employer liability. In the absence of these presumptions, employers could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination." H.R. Rep. No. 869, Pt. I, 96th Cong., 2d Sess. 86 (1980). The court of appeals' decision would eviscerate the protections designed by Congress to assist multiemployer plans, with little, if any, corresponding legitimate benefit.

CONCLUSION

The decision of the court of appeals that Section 1401(a) (3) (A) violates the Due Process Clause should be reversed and the case remanded for further proceedings.

Respectfully submitted,

RICHARD H. MARKOWITZ*
PAULA R. MARKOWITZ
R. DAVID WALK, JR.
Markowitz & Richman
121 South Broad Street
1100 North American Building
Philadelphia, PA 19107
(215) 875-3100

**Counsel of Record*

APPELLANT'S BRIEF

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No. 86-231

In the Supreme Court of the United States

OCTOBER TERM, 1986

PENSION BENEFIT GUARANTY CORPORATION, APPELLANT

v.

YAHN & MCDONNELL, INC. and
THE PENNSTAR COMPANY, ET AL.

On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF FOR THE APPELLANT

JOHN H. FALSEY
Acting General Counsel

PETER H. GOULD *
Deputy Assistant General Counsel

DAVID F. POWER
LONIE HASSEL
Attorneys

Pension Benefit Guaranty Corporation
2020 K Street, N.W.
Washington, D.C. 20006
(202) 778-8823

* *Counsel of Record*

Of Counsel:

KENNETH S. GELLER
KATHRYN A. OBERLY
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

MITCHELL L. STRICKLER
3803 Gramercy Street, N.W.
Washington, D.C. 20016
(202) 244-1072

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. 1401(a)(3)(A), provides that, after the trustees of a multiemployer pension plan have made an initial determination of an employer's liability upon withdrawal from the plan, their determination shall be accorded a presumption of correctness in any subsequent arbitration proceeding unless the employer shows by a preponderance of the evidence that the trustees' determination was unreasonable or clearly erroneous.

The question presented is whether Section 104(2) violates the Due Process Clause of the Fifth Amendment because of the supposed bias of the trustees.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan (the Pension Plan); and Robert E. Zimmer, Michael Paolella, John P. Morris, and James P. Smith, Jr., Trustees of the Pension Plan, were plaintiffs in the district court and appellees in the court of appeals. These parties are appellants in this Court in *United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan, et al.* v. *Yahn & McDonnell, Inc., et al.*, No. 86-253, which has been consolidated for oral argument with this case.

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In the Supreme Court of the United States

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No. 86-231

PENSION BENEFIT GUARANTY CORPORATION, APPELLANT

v.

YAHN & MCDONNELL, INC. and
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On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-40a) is reported at 787 F.2d 128. The opinion of the district court (J.S. App. 41a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals (J.S. App. 50a-51a) was entered on March 31, 1986. The Pension Benefit Guaranty Corporation (PBGC), a wholly-owned government corporation and an agency of the United States, was granted leave to intervene post-judgment for the purpose of seeking rehearing and, if necessary, review in this Court (J.S. App. 52a-53a). The PBGC's petition for rehearing was denied on April 23, 1986 (J.S. App. 54a-55a). The PBGC filed a notice of appeal to this Court on May 21, 1986 (J.S. App. 56a-57a). On July 9, 1986, Justice Brennan extended the time for docketing the PBGC's appeal to and including August 19, 1986. The jurisdictional statement was filed on August 14, 1986, and this Court noted probable jurisdiction on December 1, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208, are set forth at J.S. App. 60a-67a.[1] The provision of the statute held unconstitutional by the court of appeals is Section 104(2) of the MPPAA, 29 U.S.C. 1401(a)(3)(A), which provides:

> For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

STATEMENT

In 1980, after years of legislative and executive branch consideration of a serious national problem—the plight of thousands of American workers whose expectations of receiving promised benefits had been shattered by the insufficient funding of their pension plans—Congress enacted the Multiemployer Pension Plan Amendments Act. Among other things, the MPPAA serves to protect the financial stability of multiemployer pension plans[2] and the retirement income security of millions of participants by requiring employers who withdraw from multiemployer plans to continue funding their share of the plans' liabilities. This Court has twice rejected constitutional challenges to Congress's decision to impose withdrawal liability. *Connolly* v. *PBGC*, 106 S.Ct. 1018 (1986), and *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984).

The court of appeals in this case held that the Due Process Clause of the Fifth Amendment prohibits Congress from according to plan trustees and actuaries any discretion to tailor the rules governing assessments of withdrawal liability to their plans' circumstances without also making any exercise of that discretion subject to de novo review by an "impartial decisionmaker." As background for our submission that the court of appeals erred in so holding, we outline briefly the history and purposes of the MPPAA, as well as the pertinent facts of the instant case.

A. The Statutory Background.

Congress recognized in the MPPAA that "the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans." 29 U.S.C. 1001a(a)(3). As one witness explained to Congress (*Multiemployer Pension Plan Termination Insurance Program: Hearing Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 50 (1979) (statement of Robert A. Georgine, Chairman, National Coordinating Committee for Multiemployer Plans) [hereinafter cited as *1979 House Hearing*]):

> For the most part, multiemployer plans were established in those industries where there was little if any likelihood that individual employers would or could establish single-employer plans for their em-

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[1] ERISA was recently amended, in respects not relevant to this case, by the Single-Employer Pension Plan Amendments Act of 1986, enacted as Title XI of the Comprehensive Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 237 *et seq.*

[2] A multiemployer plan is defined as a plan to which more than one employer is required to contribute, which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and which satisfies such other requirements as the Secretary of Labor may prescribe by regulation. 29 U.S.C. 1301(a)(3).

> ployees. * * * In industries where there are hundreds and perhaps thousands of small employers, with countless numbers of employers going in and out of business each year, the nexus of employment has focused on the relationship of the workers to the union to which they belong, and/or the industry in which they are employed, rather than to any particular employer. Over the course of an employee's lifetime of work, he or she may be employed by dozens of different employers. Without the multiemployer plan, with its internal termination insurance mechanism and its voluntary portability within the plan, those millions of employees would never receive any retirement benefits, other than the small social security payments to which they might be entitled.

See also H.R. Rep. No. 96-869, Pt. I, 96th Cong., 2d Sess. 53 (1980).

The importance of multiemployer plans to so many American workers led Congress to safeguard such plans from major threats to their continued viability. The most significant problem was that ERISA "did not adequately protect plans from the adverse consequences that resulted when individual employers terminate[d] their participation in, or [withdrew] from, multiemployer plans." *Gray*, 467 U.S. at 722. In particular, as Congress stated in the MPPAA's declaration of policy, "withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations." 29 U.S.C. 1001a(a)(4)(A). See also 126 Cong. Rec. 20178 (1980) (remarks of Sen. Javits); *1979 House Hearing* 50-51 (statement of Robert A. Georgine).

The history of Congress's response to these concerns has been described in considerable detail by this Court in

Connolly, 106 S.Ct. at 1021-1022, and *Gray*, 467 U.S. at 721-723. In brief, the legislative solution embodied in the MPPAA was to counteract incentives favoring employer withdrawal by requiring withdrawing employers to contribute an amount equal to their statutory share of the plan's unfunded vested benefits. See *Connolly*, 106 S.Ct. at 1022. Withdrawal liability is the cornerstone of Congress's effort "to increase the likelihood of protecting plan participants against benefit losses" (29 U.S.C. 1001a(b)(1)). At the same time, the Act was designed to avoid disincentives to new employers who might consider becoming contributors to such plans. See H.R. Rep. No. 96-869, Pt. II, *supra*, at 15.

Congress made multiemployer pension plan trustees responsible for determining, assessing, and collecting the amounts of withdrawal liability owed by departing employers. Various determinations made by the trustees in the process of collecting this debt are presumed correct under Section 104(2) of the MPPAA, 29 U.S.C. 1401(a)(3), "in order to ensure the enforc[e]ability of employer liability." H.R. Rep. No. 96-869, Pt. I, *supra*, at 86.

B. The Statutory Process For Determining Withdrawal Liability.

Withdrawal liability is an employer's statutory share of the pension plan's "unfunded vested benefits." 29 U.S.C. 1381(b)(1). "[U]nfunded vested benefits" are defined as "(A) the value of nonforfeitable benefits under the plan, less (B) the value of the assets of the plan." 29 U.S.C. 1393(c). The plan sponsor[3] determines the employer's share of unfunded vested benefits by using one of several allocation methods specified in 29 U.S.C. 1391. The "presumptive" allocation method, which was employed in this case, is set forth in Section

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[3] The "plan sponsor" of a multiemployer pension plan is defined in 29 U.S.C. 1301(a)(10)(A) as the plan's joint board of trustees.

1391(b).[4] Congress provided that this method would apply to most plans unless the plan were amended to adopt an alternative allocation method. *Ibid.*; 29 U.S.C. 1391(c) and (d). Three permissible alternative allocation methods are set forth in Sections 1391(c)(2), (3) and (4). In addition, the Act permits the plan sponsor to use an allocation method of its own design, subject to the PBGC's approval based on the PBGC's determination that the plan's method will "not significantly increase the risk of loss to plan participants and beneficiaries or to the [PBGC]." 29 U.S.C. 1391(c)(5)(A). See H.R. Rep. No. 96-869, Pt. I, *supra*, at 77. The MPPAA requires that the allocation method selected be applied only to withdrawals occurring after the date of the selection, and the Act further requires uniform application to all withdrawing employers of whichever allocation method the plan sponsor has adopted. 29 U.S.C. 1394. See H.R. Rep. No. 96-869, Pt. I, *supra*, at 85.

The amount of withdrawal liability depends on the value of the plan's unfunded vested benefits that are subjected to the allocation process. In calculating the value of nonforfeitable benefits under a pension plan, it is necessary to use certain "actuarial assumptions and methods," which either must follow regulations that the PBGC is authorized to issue[5] or be "reasonable" and "offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. 1393(a).

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[4] Under the presumptive method of allocation, the plan sponsor must determine a withdrawing employer's proportional share of each of three different categories of unfunded vested benefits. 29 U.S.C. 1391(b)(1)(A), (B) and (C). These shares are derived from fractions comparing the employer's contributions to the plan to the contributions made by all employers to the plan during the same periods. 29 U.S.C. 1391(b)(2)(E)(ii), 1391(b)(3)(B), 1391(b)(4)(D)(ii).

[5] The PBGC has not yet decided whether to promulgate regulations concerning appropriate actuarial assumptions.

As soon as practicable after an employer's withdrawal from a pension plan, the plan trustees must notify the employer of "the amount of the liability" and "the schedule for liability payments" and make demand for payment. 29 U.S.C. 1399(b)(1). The employer may then ask the plan trustees to review any specific matter relating to the determination of liability, may identify any inaccuracies in the determination, and may "furnish any additional relevant information." 29 U.S.C. 1399(b)(2)(A). The trustees must review the issues raised by the employer and notify the employer of their decision and the basis for it. 29 U.S.C. 1399(b)(2)(B).

The MPPAA also prescribes procedures to be followed if, after the above-described steps, a disagreement remains between the pension plan and the employer over any determination made by the plan trustees relating to the employer's withdrawal liability. 29 U.S.C. 1401. Either the employer or the plan may initiate arbitration, which must be conducted "in accordance with fair and equitable procedures" (29 U.S.C. 1401(a)(2)) that have been promulgated by the PBGC.[6] Section 104(2) of the MPPAA, 29 U.S.C. 1401(a)(3)(A), the provision found unconstitutional by the court of appeals, provides that:

> For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

The Act further provides, in Section 1401(a)(3)(B), that the determination of a plan's unfunded vested benefits

> is presumed correct unless a party contesting the determination shows by a preponderance of the evidence that—

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[6] See *Arbitration of Disputes in Multiemployer Plans*, 29 C.F.R. Pt. 2641.

> (1) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or
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> (2) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

Congress explained that "[t]hese [presumptions] are necessary in order to ensure the enforc[e]ability of employer liability. In the absence of these presumptions, employers could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination." H.R. Rep. No. 96-869, Pt. I, *supra*, at 86. Similarly, the Senate Labor Committee explained (Sen. Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *S. 1076: The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* 20-21 (Comm. Print 1980) [hereinafter cited as *Senate Labor Summary*]):

> The Committee includes the presumption to reduce the likelihood of dispute and delay over technical actuarial matters with respect to which there are often several equally "correct" approaches. Without such a presumption, a plan would be helpless to resist dilatory tactics by a withdrawing employer—tactics that could, and could be intended to, result in prohibitive collection costs to the plan. The presumption can be rebutted in those cases where injustice would otherwise result to the withdrawing employer.

Finally, the MPPAA vests the federal district courts with jurisdiction to review the arbitrator's final decision. 29 U.S.C. 1401(b)(2). In any such proceeding, "there [is] a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 29 U.S.C. 1401(c).

C. The Facts Of This Case.

1. Yahn & McDonnell, Inc. (Yahn) entered into a series of collective bargaining agreements with United Retail and Wholesale Employees Teamsters Union Local No. 115 (the Union) (C.A. App. 15), the last of which was a three-year agreement executed in January 1980 (C.A. App. 7, 15).[7] These collective bargaining agreements required Yahn to make contributions to the United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan (J.S. App. 6a).

The Pension Plan is a multiemployer pension trust established under Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. 186(c)(5), and a "multiemployer plan" within the meaning of ERISA, 29 U.S.C. 1002(37)(A) (C.A. App. 5). The plan is administered by four trustees, two of whom were appointed by contributing employers and two of whom were appointed by the Union (J.S. App. 6a). The trustees are "fiduciaries" within the meaning of ERISA, 29 U.S.C. 1002(21)(A).

Yahn made all of the contributions required by the collective bargaining agreements until November 1981, when it ceased operations and withdrew from the Pension Plan (J.S. App. 6a). In April 1982, the Plan issued a demand for payment of approximately $458,000 in withdrawal liability (*ibid.*). In its demand for payment, the Plan stated, *inter alia*, that it used the presumptive method for determining withdrawal liability and that, "[u]nder this method, the Fund Actuary, Peat, Marwick, Mitchell & Co., has determined the withdrawal liability of Yahn & McDonnell, Inc." (C.A. App. 46, 109).

In July 1982, Yahn made a request for review of the liability determination (J.S. App. 7a). Yahn sought consideration of several specific issues, including the actuarial assumption of a 6% rate of return on the Plan's investments that had been employed to calculate the Plan's unfunded vested benefits (C.A. App. 56). (During the year preceding Yahn's withdrawal, the Plan had also used 6% as the earnings assumption, or discount rate, for determining contributing employers' funding obligations. See 29 U.S.C. 1393(b)(1).)

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[7] The court of appeals' opinion incorrectly states that Yahn's last agreement with the Union was executed in December 1980. See J.S. App. 6a.

The trustees reviewed their initial assessment of liability at a meeting attended by counsel for the Pension Plan, counsel for Yahn, and two employees of Peat, Marwick, Mitchell & Co. (C.A. App. 102-116). At the conclusion of the trustees' review, Yahn was advised that the withdrawal liability assessment would not be altered (J.S. App. 7a). Yahn invoked its right to arbitration, but the arbitration proceeding was placed in abeyance pending resolution of the constitutional issues raised by Yahn in this litigation (*ibid.*).

2. The Pension Plan and its trustees commenced this action in the United States District Court for the Eastern District of Pennsylvania to collect Yahn's withdrawal liability (J.S. App. 7a). In its answer, Yahn raised numerous constitutional challenges to the MPPAA; among other things, Yahn asserted that the MPPAA denied it due process because the initial determination of liability was made by "biased" trustees (*ibid.*). After briefing, the district court upheld the MPPAA against all of Yahn's constitutional attacks, but dismissed the Plan's request for attorneys' fees, costs, and liquidated damages (J.S. App. 41a-49a).

3. Yahn appealed from the adverse judgment against it, and the Pension Plan appealed from the denial of attorneys' fees, costs, and liquidated damages. Relying on "Congress' obvious desire to ensure the solvency and stability of pension plans" (J.S. App. 12a), the court of appeals first affirmed the district court's ruling that the MPPAA authorizes the Plan to maintain an action to collect withdrawal liability payments pending arbitration. Thus, the court of appeals upheld the district court's award of interim liability payments to the Plan (*ibid.*). Second, the court of appeals agreed with the Plan that the MPPAA compels an award of attorneys' fees, costs, and liquidated damages upon a judgment in favor of a pension plan for delinquent payments. With respect to this issue, therefore, the court of appeals reversed the district court's ruling that such an award would be premature prior to arbitration (*id.* at 13a-14a).

Finally, in a divided decision, the court of appeals reversed that portion of the district court's judgment upholding the MPPAA against Yahn's procedural due process challenge. The court of appeals agreed with the district court's conclusion that the statutory presumptions of correctness "survive a substantive due process analysis and a *Mathews* [v. *Eldridge*, 424 U.S. 319 (1976)] test" (J.S. App. 28a), but it held that the district court erred in failing to analyze the alleged bias of the trustees separately from the adequacy of the procedural safeguards built into the review process (*id.* at 19a). Thus, the court of appeals analyzed Yahn's procedural due process claim under "biased decisionmaker" cases such as *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); and *Tumey* v. *Ohio*, 273 U.S. 510 (1927).

Although the court of appeals acknowledged (J.S. App. 16a) that its decision was contrary to that of every other circuit to consider the issue,[8] the court held that multiemployer pension plan trustees are "biased" in favor of maximizing collections of withdrawal liability because the trustees have fiduciary duties of loyalty to the pl[illegible]er Section 404 of ERISA, 29 U.S.C. 1104, and may [illegible] subject to personal liability for violating those duties under Section 409 of ERISA, 29 U.S.C. 1109 (J.S. App. 21a-25a). The court further held that the trustees' "manifest and significant bias" (*id.* at 24a) was not cured by limits on the scope of their decisionmaking authority (*id.* at 25a-27a). Instead, the court was of the view that the trustees' determination of withdrawal liability involves the exercise of broad discretion in three separate areas: (1) the trustees select from among four statutory methods, or their own method, for allocating withdrawal liability; (2) they determine appropriate actuarial "discount rates"; and (3) they determine the applicability of several statutory exemptions to the Act's withdrawal liability provisions (*ibid.*). Accordingly, the court concluded that the trustees' role is "adjudicative" because "[t]he trustees perform the judicial task of making *case-by-case determinations* significantly affecting the property of employers" and "must frequently make complex legal and factual determinations" (*id.* at 26a-27a n.18 (emphasis added)). Finally, the court held that the opportunity for further review—specifically, the right to invoke arbitration and review in federal district court—did not cure the supposed taint of the trustees' bias because, under the statutory presumption of correctness, any subsequent proceedings would themselves be tainted by the initial decision of the "biased" trustees (*id.* at 27a-28a).

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[8] See *Keith Fulton & Sons, Inc.* v. *New England Teamsters & Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137 (1st Cir. 1985) (en banc); *Bd. of Trustees* v. *Thompson Bldg. Materials, Inc.*, 749 F.2d 1396 (9th Cir. 1984), cert. denied, 471 U.S. 1054 (1985); *Washington Star Co.* v. *Int'l Typographical Union Negotiated Pension Plan*, 729 F.2d 1502 (D.C. Cir. 1984); *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 725 F.2d 843 (2d Cir.), cert. denied, 467 U.S. 1259 (1984); *Republic Indus-*

For relief, the court of appeals determined that the statutory presumption of correctness accorded the trustees' liability determinations in arbitration could be severed from the remainder of the statute (J.S. App. 28a-

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tries, Inc. v. *Teamsters Joint Council No. 83*, 718 F.2d 628 (4th Cir.), cert. denied, 467 U.S. 1259 (1984).

33a).[9] Thus, the court rewrote the statute to require de novo determinations of withdrawal liability in arbitration proceedings. Such de novo proceedings, the court held, would satisfy the constitutional requirement of an "impartial decisionmaker" (*id.* at 31a-32a).[10]

Judge Seitz dissented from the majority's resolution of the constitutional question. He took issue with the court's view of the breadth of discretion available to the trustees in making determinations of withdrawal liability (J.S. App. 35a-39a), concluding that "whatever residual discretion the trustees enjoy is [not] inconsistent with due process" (*id.* at 39a). Judge Seitz also expressed concern that the court's invalidation of the statutory presumption of correctness "promises to frustrate severely the congressional enforcement scheme. Without the presumption the plan may well, as Congress feared, 'be helpless to resist dilatory tactics by a withdrawing employer—tactics that could, and could be intended to, result in prohibitive collection costs to the plan' " (*id.* at 40a (quoting *Senate Labor Summary* 21)).

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[9] The court of appeals struck down only subparagraph (A) of Section 1401(a)(3), which accords a presumption of correctness to the trustees' determinations of liability and their application of various exemptions and moderating provisions authorized by the Act. Curiously, the court did not in terms invalidate the presumption of correctness contained in subparagraph (B) of Section 1401(a)(3), which applies expressly to actuarial assumptions, even though, in its discussion of specific decisions purportedly made by the trustees, the court appeared to find that the selection of actuarial assumptions posed the greatest risk of harm to withdrawing employers (J.S. App. 18a, 26a).

[10] Upon learning that the court of appeals had held a provision of the MPPAA unconstitutional, the PBGC filed a motion to intervene for the purpose of seeking rehearing and further review, if necessary, in this Court. The court of appeals granted the PBGC's motion to intervene (J.S. App. 52a-53a), but it denied rehearing (*id.* at 54a-55a).

SUMMARY OF ARGUMENT

In *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984), this Court held that retroactive application of the withdrawal liability provisions of the MPPAA did not violate substantive due process. Last Term, in *Connolly* v. *PBGC*, 106 S. Ct. 1018 (1986), the Court held that the imposition of withdrawal liability did not constitute a "taking" in violation of the Just Compensation Clause of the Fifth Amendment. In so ruling, the Court noted that, in light of *Gray*, "it would be surprising indeed to discover now that * * * Congress unconstitutionally had taken the assets of the employers there involved." 106 S. Ct. at 1025. It is equally surprising to discover that, according to the Third Circuit, the procedures that Congress believed critical to the collection of withdrawal liability violate procedural due process.

A. The court of appeals arrived at its remarkable conclusion by relying on this Court's "biased decisionmaker" cases. But the court failed to engage in any reasoned analysis of the applicability of that line of cases to the determinations actually made by plan trustees in assessing withdrawal liability. Thus, the court summarily equated (J.S. App. 22a-23a) multiemployer pension plan trustees' statutorily mandated duty to promote the interests of the fund they administer with the "possible temptation" of the mayor in *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972), to garner funds for his municipal treasury from the fines he imposed in traffic cases.

Ward, however, like the cases of *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), and *Tumey* v. *Ohio*, 273 U.S. 510 (1927), dealt with simple, clear-cut abuse—or the manifest potential for abuse—of the judicial process. Those cases share two critical features that are totally lacking in the instant case: (1) the decisionmakers were found to labor under a conflict with official duty caused by financial temptations that had no relation to the proper

grounds for judging traffic offenses, liquor violations, or professional qualifications in the field of optometry; and (2) the determinations they were called upon to make occurred in the context of traditional "adjudications."

Although the court of appeals seemed unable to look beyond the simple model of a judge corrupted by the prospect of financial benefit, this case bears no resemblance to that model. To begin with, pension plan trustees do not act in an adjudicative capacity when they determine withdrawal liability. Indeed, the trustees' selection of a method for allocating a withdrawing employer's share of a plan's unfunded vested benefits is not even a "determination" (29 U.S.C. 1401(a)(3)(A)) subject to review in individual arbitration proceedings. Rather, it is a policy judgment committed by Congress to the discretion of plan trustees to enable them to choose the allocation method that best suits the particular circumstances of their plan. Because there is no statutory or other standard that would make the selection of a particular method "right" or "wrong," an arbitrator would have no principled basis upon which to conclude that the trustees should have chosen some different method. For that reason, an arbitrator would have no occasion to apply the MPPAA's presumption of correctness to the trustees' chosen method.

B. Even if Congress had intended the trustees' choice of an allocation method to be subjected to arbitral review, that choice still would not constitute an "adjudicative" decision of the type at issue in the "biased decisionmaker" cases. The trustees instead make a policy judgment, applicable to all withdrawing employers, based on their assessment of the allocation method that would best suit their plan and, hence, the statutory objectives. Given their intimate familiarity with the intricacies of multiemployer plan administration and the detailed requirements of ERISA and the MPPAA, the trustees are clearly the persons best equipped to make that policy choice. Congress's decision to vest the trustees with such discretion in the fixing of rules for determining withdrawal liability is entirely consistent with this Court's recognition that the Due Process Clause does not prohibit policy-type decisionmaking by persons having special expertise in the subject at issue. See, *e.g.*, *Hortonville Joint School Dist. No. 1* v. *Hortonville Education Ass'n*, 426 U.S. 482 (1976).

The same analysis applies to Congress's decision to commit the choice of actuarial assumptions and methods to the persons most qualified to make such determinations—independent, professional actuaries. Congress knew that it could not itself legislate actuarial assumptions and methods that would meet the needs of thousands of diverse multiemployer pension plans, and it therefore concluded that actuaries should be accorded a degree of flexibility in arriving at determinations that have no single, correct result. Congress thereby sought to avoid lengthy, costly and futile litigation that would serve only to frustrate the efficient collection of withdrawal liability. By contrast, the court of appeals' requirement of de novo arbitral review of actuarial assumptions would result in inequitable and disparate treatment of similarly situated withdrawing employers, and it would do so at the expense of the plan stability that Congress sought to promote when it enacted the MPPAA.

C. The court of appeals further erred in concluding that multiemployer pension plan trustees labor under a personal or institutional conflict of interest that prevents them from making impartial determinations of withdrawal liability. While it is true that the trustees are fiduciaries under ERISA, 29 U.S.C. 1002(21)(A), owing an exclusive duty of loyalty to the plan (29 U.S.C. 1104), it is *not* true that that duty of loyalty is necessarily fulfilled by maximizing withdrawal liability assessments. Congress expressly recognized that multiemployer trustees must balance a number of conflicting factors to arrive at a result that is solely in the interest of plan participants and beneficiaries. Thus, multiemployer trustees, to fulfill their fiduciary duties, must not only attempt to ensure that their actions result in adequate funding for their plans, but they must also consider whether the imposition of excessive amounts of withdrawal liability would deter other employers from becoming new plan entrants. When the trustees balance these competing interests, they are doing exactly what Congress expected of them; in no way are they acting to promote illegitimate interests of the sort condemned in *Ward* and *Tumey*.

D. Even if this Court's "biased decisionmaker" cases were controlling here, the court of appeals misapplied those cases. Contrary to the Third Circuit's belief, trustees of a multiemployer plan do not make "case-by-case [judicial] determinations" (J.S. App. 27a n.18) when they assess an employer's withdrawal liability. Instead, the trustees calculate the liability of a withdrawing employer by following detailed statutory guidelines of general applicability that severely limit their discretion. Moreover, independent actuaries, rather than the trustees themselves, are responsible for selecting the actuarial assumptions and methods that the court of appeals believed presented the greatest potential for trustee abuse. The actuaries ordinarily are not plan fiduciaries and, by statute, their assumptions and methods must be "reasonable" and provide the actuaries' "best estimate of anticipated experience under the plan" (29 U.S.C. 1393(a)(1)), rather than the estimate that might result in the largest assessment of withdrawal liability.

E. The misperceptions contained in the court of appeals' opinion led it to mandate a procedure—de novo arbitral review of withdrawal liability assessments—that undermines major statutory objectives and is unworkable in practice. Without the presumption of correctness invalidated by the court of appeals, the number and scope of arbitration proceedings—and hence the plans' costs of collection—will inevitably increase. Because Congress knew that there would be no single, "correct" amount of withdrawal liability, its decision to enact litigation-dampening presumptions was plainly rational and fully consistent with due process.

ARGUMENT

THE DISPUTE RESOLUTION PROCEDURES OF THE MPPAA DO NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

In conflict with the decisions of five other courts of appeals, the Third Circuit has invalidated a statutory presumption designed to assist multiemployer pension plans in collecting withdrawal liability payments required under the MPPAA. The court of appeals erred in concluding that the trustees of multiemployer plans have either a personal or an institutional interest in maximizing collections of withdrawal liability, and it seriously misapprehended the scope of discretion accorded to the trustees in determining withdrawal liability. Thus, the court erroneously relied on a rigid and inflexible interpretation of this Court's "biased decisionmaker" cases[11] to strike down a central component of Congress's scheme to improve the financial stability of multiemployer pension plans.

The court of appeals' unfounded requirement of de novo arbitration proceedings threatens to increase substantially the number and complexity of such proceedings. Absent the presumption invalidated by the court below,

multiemployer pension plans will experience added delays and incur increased costs in collecting withdrawal liability. The resulting interference with enforcement of employer obligations could significantly drain the resources of many plans and of the PBGC's financial assistance fund. The Due Process Clause does not mandate these undesirable results.

A. Plan Trustees And Actuaries Do Not Make "Adjudicative" Decisions When They Establish Rules Governing Withdrawal Liability.

The court of appeals' decision striking down Section 104(2) of the MPPAA was premised on the conclusion that plan trustees exercise adjudicative or judicial powers when they establish rules governing withdrawal liability. See J.S. App. 20a-21a. In performing this role, however, trustees do not engage in any of the functions that normally attend an adjudicative decision. They do not determine the "truth" of disputed versions of historical facts, they do not make credibility determinations, and they do not seek to arrive at the "right" answer to a question that, as Congress itself recognized (*Senate Labor Summary* 20), has no single, correct resolution. Instead, they apply their special expertise in the complexities of multiemployer plan administration to the policies that Congress sought to promote when it enacted the MPPAA.

1. That the trustees are making essentially legislative judgments rather than engaging in case-by-case adjudication may be seen most clearly from a brief review of the statutory provisions governing the trustees' selection of a method by which to allocate a withdrawing employer's share of a plan's unfunded vested benefits.[12] This

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[11] See, *e.g.*, *Schweiker* v. *McClure*, 456 U.S. 188 (1982); *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238 (1980); *Friedman* v. *Rogers*, 440 U.S. 1 (1979); *Gibson* v. *Berryhill*, 411 U.S. 564 (1973); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *Tumey* v. *Ohio*, 273 U.S. 510 (1927).

[12] As previously noted, the Act establishes four permissible methods for allocating unfunded vested benefits—the presumptive method and three alternative methods referred to as (1) the modified presumptive method, (2) the rolling-five method, and (3) the attribution method. Comptroller General of the United States, GAO/HRD-85-16, *Effects of Liabilities Assessed Employers With-*

was one of the three areas in which the court of appeals thought that the trustees had the opportunity to exercise significant discretion (J.S. App. 25a). The court of appeals failed to appreciate, however, that the trustees' choice of an allocation method, far from constituting an adjudicative decision warranting de novo arbitral review, is not even a "determination" subject to arbitration under 29 U.S.C. 1401(a)(3)(A).

It goes without saying that many decisions made by plan trustees may have a significant effect on employers' withdrawal liability but are not subject to arbitral review in the case of a particular withdrawing employer. Decisions to increase benefit levels or to alter investment strategies are two obvious examples. An arbitrator asked to second-guess the trustees' exercise of judgment in these areas would have "no law to apply" (*Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971)), because there is no "right" or "wrong" approach.

By the same token, the choice of an allocation method is not a decision intended to determine the "truth" of any proposition presented to the trustees. Rather than "adjudicating" any factual or legal questions, the trustees are simply establishing a rule of general applicability that, in their expert opinion, is best suited to Congress's purposes in the context of their particular plan. In these circumstances, there is simply no principled basis upon which an arbitrator could rest a decision that a plan should have selected a different allocation method. Cf. *Heckler* v. *Chaney*, 470 U.S. 821 (1985).

The court of appeals' error is further evidenced by the statutory provisions authorizing the trustees to amend

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drawing From Multiemployer Pension Plans 34-35 (1985) [hereinafter cited as *Liabilities Report*]. Plans may also adopt an allocation method of their own design (with PBGC approval); like the methods specified in the Act, any such non-statutory method must allocate "substantially all of a plan's unfunded vested benefits" (29 U.S.C. 1391(c)(5)(B)).

the terms of their plan to adopt the allocation method of their choice so long as the trustees adopt their amendment *in advance* of any withdrawals that will be governed by the amendment and apply the method *uniformly* to all such withdrawing employers. 29 U.S.C. 1391(c)(1) and 1394.[13] Once the trustees have made their selection, nothing in the Act suggests that an arbitrator has the power to review or overrule the trustees' chosen allocation method, so long as the trustees choose from among the alternatives specified by Congress.[14] Thus, the court of appeals erred in implicitly assuming that the choice of an allocation method is a "determination" subject to arbitral review at the behest of an individual withdrawing employer. There is, in fact, no occasion for an arbitrator to apply the Act's presumption of correctness to the trustees' chosen allocation method.

By contrast, the court of appeals' new requirement of arbitral review of the selection of an allocation method would transform the legislative determination that Congress intended to leave with the trustees into case-by-case adjudication, resulting in totally random and arbitrary results for plans and for withdrawing employers. The court's conclusion that the choice of an allocation method must be reviewed de novo in arbitration could be accomplished in one of two ways, either of which would be totally unworkable in practice. On the one hand, the first employer to challenge the allocation method used by a particular plan could convince an arbitrator to employ a different method. If subsequent arbitrators were to remain faithful to the Act's command that the allocation method be applied uniformly to all withdrawing employers (29 U.S.C. 1394(b)), they would be required to follow the decision of the first arbitrator—who would be selected in whatever case happened to arise first—whether or not they agreed with it and whether or not it made policy sense for the plan. Contrary to congressional intent (see pages 23-25, 32-34, *infra*), the long-term stability of the plan would not necessarily be the determinative factor in the choice of an allocation method.[15]

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[13] The latter section provides as follows:

> (a) No plan rule or amendment adopted after January 31, 1981, under section 1389 or 1391(c) of this title may be applied without the employer's consent with respect to liability for a withdrawal or partial withdrawal which occurred before the date on which the rule or amendment was adopted.
>
> (b) All plan rules and amendments authorized under this part shall operate and be applied uniformly with respect to each employer * * *. The plan sponsor shall give notice to all employers who have an obligation to contribute under the plan and to all employee organizations representing employees covered under the plan of any plan rules or amendments adopted pursuant to this section.

[14] Of course, a plan's improper application of an allocation method may be challenged in arbitration. Cf. *Dravo Corp. and IAM Nat'l Pension Fund*, 6 Empl. Ben. Cas. 2641 (1985) (Mittelman, Arb.) (attempt to apply new plan rule without proper statutory notice to employer invalidated by arbitrator).

On the other hand, if the allocation method for a particular plan were subject to reconsideration in the case of each withdrawing employer, Congress's command that the method be applied uniformly to all withdrawing employers would effectively be written out of the statute. If each arbitrator were free to overturn a plan's selection of an allocation method, the method would vary from employer to employer, and employers withdrawing from the same plan at the same time could not know what allocation method might be used to assess their liability. But Congress prohibited the retroactive application of an allocation method (29 U.S.C. 1394(a)) in order to protect employers from just such unanticipated changes in withdrawal liability. See H.R. Rep. No. 96-869, Pt. I, *supra*, at 85.[16] Thus, under the guise of ensuring due process for employers, the court of appeals' ruling would eviscerate the statutory protections enacted for the benefit of employers.

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[15] It bears noting that if a plan adopts an alternative allocation method requiring PBGC approval, the criteria to be considered by the PBGC in determining whether to approve the amendment in no way relate to the interests of employers. The MPPAA provides for PBGC approval of a plan amendment that adopts a non-statutory allocation method if that method would "not significantly increase the risk of loss to plan participants and beneficiaries or to the [PBGC]." 29 U.S.C. 1391(c)(5)(A). See also 29 U.S.C. 1400.

2. Even if Congress had intended to subject the choice of an allocation method to arbitral review, and hence to the presumption of correctness invalidated by the court of appeals, that choice still would not constitute an "adjudicative" decision within the scope of the "biased decisionmaker" cases. Rather, it is a policy determination that Congress deliberately committed to the expertise of the plan sponsor. Congress enacted a "presumptive method" to be used unless the plan adopts an alternative allocation method. 29 U.S.C. 1391(b), (c), and (d). The method that Congress selected as the "presumptive method" was chosen because Congress was persuaded that, in general, it offered the best prospects for avoiding the creation of disincentives to new employers considering entry into a plan. See, *e.g.*, *Senate Labor Summary* 18; H.R. Rep. No. 96-869, Pt. I, *supra*, at 67; *1979 House Hearing* 29, 36, 123 (statements of Donald Seifman & Malcolm L. Pritzker). As one witness stated, "new entrants are the lifeblood of the multiemployer plan"; thus, "[w]ithdrawal liability must be allocated in a way that does not deter new employers from entering the plan." *1979 House Hearing* 29, 36 (statement of Donald Seifman); see also *id.* at 48 (statement of Paul Berger).

Nevertheless, Congress determined that mandating resort to the "presumptive method" alone would be too rigid and that plans needed a greater degree of flexibility to enable them to respond to their own special circumstances. See *1979 House Hearing* 31, 129-130 (statements of Donald Seifman & the Associated General Contractors of America); *Multiemployer Pension Plan Amendments Act of 1979: Hearings Before the Sen. Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 409 (1979) (comments of Robert A. Georgine).[17] Accordingly, Congress authorized plan trustees to select one of three detailed, alternative allocation methods and further authorized the PBGC to approve other allocation methods. 29 U.S.C. 1391(c)(2)-(c)(4) and (c)(5)(A).

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[16] Congress also required multiemployer plans to provide employers with the general information necessary to compute their potential withdrawal liability so that employers would be able to use that information *before* deciding whether to leave the plan. See 29 U.S.C. 1401(e).

Congress was aware that by permitting the use of certain alternative allocation methods it was preserving, rather than altering, the status quo. As the PBGC's Acting Executive Director pointed out, "[j]ust as multiemployer plans evolved many different arrangements to suit varying needs before ERISA, plans will be free to propose allocation rules matched to their own characteristics and needs." *1979 House Hearing* 156. Similarly, the House Report on the MPPAA explained (H.R. Rep. No. 96-869, Pt. I, *supra*, at 67):

> [T]he bill provides alternative rules which would result in different allocations of unfunded benefit obligations and permits a plan to select the rule it will use. * * * Plan fiduciaries are given a great deal of flexibility to strike a balance among the competing considerations of encouraging new entrants, discouraging withdrawals, easing administrative burdens, and protecting the financial soundness of a fund.[18]

The legislative history contains not the slightest suggestion that Congress believed there was a single "right" allocation method for every plan or that trustees act as "adjudicators" when selecting an allocation method for their plan. Moreover, the court of appeals never considered Congress's clearly rational determination that plan flexibility in selecting an allocation method might promote long-term plan stability. The court's opinion displays no awareness of Congress's motivation for according plan trustees the authority to select an allocation method that is best suited to the circumstances of their particular plan. As Judge Seitz recognized in dissent, however, it was plainly appropriate for Congress to assign this role to the trustees (J.S. App. 36a):

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[17] For example, the "attribution method" (29 U.S.C. 1391(c)(4)) permits plans to assess withdrawal liability on the basis of "attribution of the unfunded vested benefits earned through service with the withdrawn employer, plus a proportional share of liabilities that are not attributable to current contributors." 126 Cong. Rec. 23041 (1980) (remarks of Rep. Thompson). Plans that have sufficiently detailed recordkeeping to enable the use of this method believe that it is the most equitable because "it relates liability to an employer's employees." *Liabilities Report* 38. Other plans have chosen the "modified presumptive method" (29 U.S.C. 1391(c)(2)) because of its administrative simplicity and consequent reduced cost. *Liabilities Report* 38. Congress also authorized plans to adopt the "rolling-five method" (29 U.S.C. 1391(c)(3)); plans that have chosen this method believe that it is "the easiest and least costly to administer and the simplest to understand and explain." *Liabilities Report* 38.

[18] The MPPAA contains numerous provisions according plans flexibility in selecting withdrawal liability rules on the basis of their special circumstances. For example, Congress authorized plans to increase the statutory de minimis amounts that eliminate withdrawal liability for most withdrawing employers. 29 U.S.C. 1389(b); *Liabilities Report* 41-45. Congress also authorized plans to permit small employers to enter for brief periods without becoming subject to withdrawal liability (29 U.S.C. 1390) and to adopt rules that eliminate withdrawal liability for employers in the construction industry unless they continue work in competition with employers that contribute to the plan (29 U.S.C. 1383(b)(1)(B)(ii)). These provisions are designed to permit plan trustees to determine whether Congress's purposes are better served by increased collection of withdrawal liability or by reduced collections that encourage plan entry. Clearly, such determinations are classical "policy" decisions. Yet, under the court of appeals' rationale, each such decision, because it can "affect[] the property of employers" (J.S. App. 27a n.18), would be subject to de novo review in arbitration.

I find it difficult to understand the majority's apparent conclusion that fiduciaries of the pension fund should be held incompetent to establish general plan rules for calculating withdrawal liability.

3. The court of appeals' requirement that the actuarial assumptions and methods employed in the calculation of withdrawal liability be subjected to de novo arbitral review (but see page 13 note 9, *supra*) is as inconsistent with congressional objectives as the court's treatment of the selection of an allocation method. Congress assigned the responsibility for choosing actuarial assumptions and methods to the persons most experienced in making such determinations—independent, professional actuaries (see pages 36-38, *infra*). Again, Congress understood the necessity of according plan actuaries a measure of flexibility in their work. Congress recognized that it would have been actuarial folly to attempt to legislate uniform actuarial assumptions to be employed by more than 2,000 multiemployer plans with widely differing investment experiences, cash flow requirements, participant age distributions, and the like.

Accordingly, the MPPAA requires actuaries to select assumptions "taking into account the experience of the plan and reasonable expectations" (29 U.S.C. 1393(a)(1))—a directive that obviously presupposes different actuarial assumptions for different plans. Furthermore, "the [PBGC's] regulations may prescribe *ranges* of applicable assumptions, to enable plans to use a PBGC-prescribed approach *adapted to the plan's own experience*." 126 Cong. Rec. 23041 (1980) (emphasis added) (remarks of Rep. Thompson). Congress thus appreciated that flexibility still would be required even after detailed agency study of the subject of actuarial assumptions. It therefore rationally determined to treat the choice of actuarial assumptions as an exercise of professional judgment, to be upheld unless demonstrably "unreasonable" or not the actuary's "best estimate." In

this manner, Congress sought to protect plans from costly disputes and delays "over technical actuarial matters with respect to which there are often several equally 'correct' approaches." *Senate Labor Summary* 20-21. See also pages 42-45, *infra*.

The court of appeals' requirement of de novo arbitral review of actuarial determinations would introduce distorted and inequitable results into Congress's chosen scheme. For example, under the MPPAA as enacted, several employers withdrawing from the same plan at approximately the same time can reasonably expect that the plan's actuary will employ the same actuarial assumptions and methods for each of them; indeed, an actuarial determination that treated one of these hypothetical withdrawing employers differently from the others would almost certainly be "unreasonable" within the meaning of 29 U.S.C. 1401(a)(3)(B)(i) and hence subject to reversal in arbitration. Under the MPPAA, therefore, similarly situated employers are treated uniformly. Under the court of appeals' rewriting of the statute, by contrast, each individual arbitrator considering the liability of a withdrawing employer de novo would be free to reject the actuarial assumptions and methods used in that particular case, thus potentially creating the anomaly of disparate treatment of identically situated employers.

Congress's limited grant of discretionary authority to plan actuaries promotes fairness and equity in yet another way. Congress specifically authorized plan actuaries to employ the same actuarial assumptions in determining withdrawal liability that they use to determine the funding obligations of contributing employers. 29 U.S.C. 1393(b).[19] The result of using the funding assumptions to calculate withdrawal liability is that withdrawing employers and contributing employers fund the plans' unfunded vested benefits on the basis of the same assumptions.[20]

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[19] ERISA imposed minimum funding obligations on employers that contribute to pension plans. 29 U.S.C. 1082. The purpose of the statutory standards was "to make as certain as possible that

In this case, the Plan's actuary employed its funding assumptions to determine Yahn's withdrawal liability. The Third Circuit's decision thus amounts to a holding that Yahn had a constitutional right to de novo review by an "impartial decisionmaker" of the Plan actuary's decision not to employ assumptions more generous to Yahn than the only assumptions that Congress expressly authorized (29 U.S.C. 1393(b)) and than the actuary used to compute continuing employers' funding obligations. We submit that due process does not require such a peculiar result.[21]

4. The foregoing discussion shows that plan trustees and actuaries applying their expertise to the essentially legislative task of assessing withdrawal liability are not engaged in the sort of case-specific, fact-bound adjudications that were at issue in the "biased decisionmaker" cases relied upon by the Third Circuit. The court of appeals failed to recognize that this Court has upheld against charges of unconstitutional bias numerous statutory schemes that do not follow the traditional model of judicial decisionmaking, recognizing that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961).

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pension fund assets would be adequate." *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 375 (1980).

[20] Approximately two-thirds of the plans surveyed in the *Liabilities Report* employed their funding assumptions to determine withdrawal liability. *Id.* at 25. The other plans surveyed in the *Liabilities Report* used assumptions that were more generous to withdrawing employers (*ibid.*). No plan surveyed in the *Liabilities Report* based withdrawal liability calculations on earnings assumptions *lower* than those used for funding purposes. These survey results hardly suggest that actuaries are biased against withdrawing employers.

[21] The Internal Revenue Code's requirement that funding assumptions be "reasonable" (26 U.S.C. 412) limits a plan actuary's ability to employ earnings assumptions that are too pessimistic, thereby protecting contributing employers from unduly large contribution requirements. Withdrawing employers receive the same protection where, as here, they are treated on a parity with contributing employers.

In *Hortonville Joint School Dist. No. 1* v. *Hortonville Education Ass'n*, 426 U.S. 482 (1976), for example, the Court held that the Due Process Clause does not prohibit the grant of policymaking functions to persons having special expertise and interest in the subject at issue. *Hortonville* rejected a due process challenge to a Wisconsin statute vesting the authority to discipline public school teachers in school board members who, according to the teachers, could not fairly decide the appropriate disciplinary measures to impose in a dispute that arose out of collective bargaining disagreements between the teachers and the Board. In the circumstances there presented, the Court concluded that the Board did not make an "adjudicative decision" (*id.* at 495), because it was obliged to reach a *policy* determination that would best serve the needs of the school system. As the Court explained (*id.* at 496 n.5):

> Policymaking is a process of prudential judgment, and we are not prepared to say that a judge can generally make a better policy judgment or, in this case, as good a judgment as the School Board, which is intimately familiar with all the needs of the school district, or that a school board must, at the risk of suspending school operations, wend its way through judicial processes not mandated by the legislature.

Friedman v. *Rogers*, 440 U.S. 1 (1979), is another example of this principle. There, the Court refused to invalidate the composition of the Texas Optometry Board, even though a majority of its members were required to be selected from one of the two opposing professional factions. Far from finding the Board's make-up unconstitutional, the Court stated that "it was reasonable for the legislature to require that a majority of the Board be drawn from a professional organization that had demonstrated consistent support for the rules that the Board would be responsible for enforcing." *Id.* at 18.

Here, too, it was entirely reasonable for Congress to entrust plan trustees and actuaries with certain legislative, policymaking functions in order to take advantage both of the trustees' institutional commitment to foster the statutory goals that led Congress to enact the MPPAA in the first place and of the actuaries' specialized knowledge of the intricacies of multiemployer plan financing.[22] The court of appeals failed to appreciate that this Court has declined to apply *Gibson*, *Ward*, and *Tumey* to the significantly different circumstances presented by more recent cases. See, *e.g.*, *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238 (1980) (administrator performing quasi-prosecutorial duties not engaged in "adjudication" and biasing influence of statutory scheme too remote and insubstantial to violate due process); *Friedman* v. *Rogers*, *supra*; *Hortonville*, *supra*. In sum, the requirements of *Ward* and *Tumey* are simply not applicable to this case.

B. Plan Trustees and Actuaries Have No Disqualifying Personal Or Institutional Bias.

Not only is the determination of withdrawal liability wholly unlike a traditional "adjudication," but plan trustees are lacking in indicia of the bias—whether personal or institutional—that has been the hallmark of the cases in which this Court has found particular persons constitutionally disqualified from performing the functions assigned to them. The Court found that the mayor-judges in *Ward* and *Tumey* were motivated by considerations that bore no relationship to traffic safety or temperance. Similarly, the state optometry board in *Gibson* was motivated by the financial advantage that Board members would gain from disenfranchising their competitors. In each of these cases, the core of the due process violation was a conflict between the standards of law supposedly being applied and evidence that the real—but generally undisclosed—agenda of the decisionmakers motivated them to decide the cases on their docket on a wholly different, self-aggrandizing basis.

Multiemployer plan trustees have no such conflict of interest. It is true that plan trustees are "fiduciaries" under ERISA, 29 U.S.C. 1002(21)(A), owing an exclusive duty of loyalty to the plan (29 U.S.C. 1104). But the court of appeals made the wholly unsupported assumption (J.S. App. 24a) that this duty requires the trustees to maximize assessments of withdrawal liability in order to avoid personal exposure for breach of their fiduciary responsibilities. In fact, as long as the trustees' actions were otherwise prudent, it is virtually inconceivable that a successful action for breach of fiduciary duty could be maintained based on the bare allegation that the trustees could have collected greater amounts of withdrawal liability. We are aware of no action brought on the Third Circuit's tenuous theory of fiduciary liability in the six years since passage of the MPPAA, a period that has seen thousands of assessments of withdrawal liability. To suggest that the threat of pecuniary injury from losing such a case creates a "conflict of interest [that] is at least as great and arguably greater than the Mayor in the *Ward* case" (J.S. App. 22a) is, we submit, strained beyond reason.

It is well established that the duty of a fiduciary under 29 U.S.C. 1104 is to act as a prudent expert would. See,

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[22] Cf. *Schweiker* v. *McClure*, 456 U.S. 188, 190 (1982) (citation omitted) (Congress intentionally decided to utilize private insurance carriers in the administration of the Medicare program in order to take advantage of their " 'great experience in reimbursing physicians' ").

e.g., *Eaves* v. *Penn*, 587 F.2d 453 (10th Cir. 1978); *Donovan* v. *Bierwirth*, 538 F. Supp. 463 (E.D.N.Y. 1981), modified on other grounds, 680 F.2d 263 (2d Cir.), cert. denied, 459 U.S. 1069 (1982).[23] The plaintiff in a suit for breach of fiduciary duty, therefore, must bear the burden of proving that plan trustees, making policy decisions about the long-term course of a complex financial program within the intricate constraints of ERISA and MPPAA rules, acted imprudently simply by failing to extract the highest amount conceivable from every withdrawing employer. But the trustees' statutory obligations with respect to withdrawal liability are more complex than the fiduciary duties of trustees in other commercial contexts, whose sole duty is to make investments and take steps that will protect and increase the corpus of their trust. In addition to their general duty to make prudent investments, multiemployer plan trustees have other statutory obligations that require them to balance conflicting factors to achieve a result that is solely in the interest of plan participants and beneficiaries. See pages 23-25, *supra*. The court of appeals' simplistic notion that ERISA requires plan sponsors always to maximize withdrawal liability was put to rest long ago by the law's authors (H.R. Rep. No. 96-869, Pt. I, *supra*, at 67):

> The committee wishes to make it clear that in choosing the rules that would eliminate or reduce liability, the choice of such a rule is not *per se* a violation of * * * fiduciary standards; the determination must be made as to whether the fiduciary has acted reasonably and in the interests of plan participants and beneficiaries and otherwise in accordance with the fiduciary standards.

Not only do multiemployer plan trustees have no general duty to maximize employer liability in every case,

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[23] As this Court has explained, "ERISA essentially codified the strict fiduciary standards that a [multiemployer] trustee must meet." *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 332 (1981).

but they could risk violating their fiduciary obligations under 29 U.S.C. 1104 if they were to approach their task in such a single-minded fashion. The First Circuit made this point in *Keith Fulton & Sons, Inc.* v. *New England Teamsters & Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137, 1142-1143 (1985) (en banc):

> This commentary [from the House Report] makes it clear that the trustees' role is not simply to find the highest value for withdrawal liability; they would not meet their fiduciary duty to the fund, for example, if they set excessively high withdrawal liabilities which would have the effect of discouraging future participation.[24]

In short, the court of appeals clearly misapprehended the effect of the fiduciary duties of multiemployer pension plan trustees in the withdrawal liability context. While it is true that trustees owe their loyalty to the plan, it is *not* true, as the court of appeals assumed (J.S. App. 21a), that that duty of loyalty is necessarily fulfilled by *maximizing* withdrawal liability assessments. The trustees must also consider whether *minimizing* withdrawal liability assessments to encourage employers to enter the plan would further Congress's goal of long-term financial stability. Thus, what the court of appeals termed the trustees' "manifest and significant bias" (*id.* at 24a) is not "bias" at all; instead, it is a statutory duty to act in the best interests of the pension plan they serve.[25] In addition, the actions that trustees take to comply with their congressionally imposed duty are different in kind from actions taken, not to advance any legislative mandate, but in furtherance of improper personal or professional interests such as those condemned in *Gibson*, *Ward*, and *Tumey*. It is the latter type of action that this Court has invalidated in the "biased decisionmaker" cases.

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[24] The legislative history relied on in *Keith Fulton* underscores Congress's intent, in enacting MPPAA's withdrawal liability provisions, to depart from ERISA's usual strict separation between the interests of contributing employers and those of the plan. For example, plan trustees must attempt to collect delinquent contributions owing from a contributing employer, a duty untempered by concern for the employer's interests. See generally *Central States Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559 (1985). A trustee who fails to make diligent efforts to collect the full amount of contributions owing could be held both to have violated the general fiduciary duties imposed by 29 U.S.C. 1104 and also to have engaged in a per se "prohibited transaction" under 29 U.S.C. 1106(a). See Prohibited Transaction Exemption 76-1, 41 Fed. Reg. 12740-12742 (1976). In order to avoid a similarly rigid rule in the withdrawal liability context, Congress enacted in MPPAA an express exemption from "prohibited transaction" liability that might otherwise result from "[a]ny transaction required or permitted" under MPPAA's withdrawal liability provisions. 29 U.S.C. 1108(b)(10).

C. The Degree Of Discretion Exercised By Plan Trustees Determining Withdrawal Liability Is Extremely Limited And Circumscribed By Statutory Directives.

Even if this Court were to agree with the court of appeals that multiemployer plan trustees make "adjudicative" decisions and that their fiduciary duties tempt them to maximize withdrawal liability, the statutory scheme established by Congress still would pass constitutional muster. Contrary to the court of appeals' central premise (see J.S. App. 25a-26a), the trustees "do not have unbridled discretion in fixing the amount of liability. They are required to compute the employer's debt according to 'detailed and explicit statutory guides'" (*Keith Fulton*, 762 F.2d at 1141 (citation omitted)). The same point was made in *Dorn's Transp., Inc* v. *I.A.M. Nat'l Pension Fund*, 578 F. Supp. 1222, 1237-1238 (D.D.C. 1984), aff'd, 753 F.2d 166 (D.C. Cir.

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[25] Cf. *Schweiker* v. *McClure*, 456 U.S. 188, 196 n.9 (1982) (bias on the part of the Secretary of HHS cannot be presumed simply because the Secretary took steps to ensure that only qualifying Medicare claims were paid).

1985) (Table), quoted with approval in *Keith Fulton*, 762 F.2d at 1142:

> [T]he role [the trustees] perform in the statutory scheme is one of administration or enforcement rather than of adjudication. Both the fact and the degree of liability are determined by the trustees according to statutorily mandated standards and methods which otherwise satisfy the requirements of due process. * * * In this respect, the precision of the Congressionally-prescribed standards cures the process of the innate taint of partiality.[26]

Thus, the court of appeals misdescribed the statutory scheme when it ruled that the trustees' role is "adjudicative" because they "perform the judicial task of making case-by-case determinations significantly affecting the property of employers" and "must frequently make complex legal and factual determinations" (J.S. App. 26a-27a n.18). In each of the three separate aspects of the withdrawal liability determination considered by the court of appeals, it wrongly concluded that the trustees exercise such significant discretion that their supposed bias would taint their ultimate determination of an employer's withdrawal liability.

First, multiemployer pension plan trustees do not make "case-by-case" selections of a method for allocating unfunded vested benefits. As previously explained (see pages 20-23, *supra*), the MPPAA expressly requires *prospective* and *uniform* application to *all* withdrawing employers of whatever allocation method is used by the plan. 29 U.S.C. 1394. Moreover, the court of appeals never suggested that trustees always know in advance which employers will withdraw or that they use such knowledge to select an allocation method that will maximize withdrawal liability receipts. (The allocation method that will maximize withdrawal liability varies from employer to employer.) On the contrary, no basis has been shown for concluding that plan trustees consider anything other than long-term policy objectives when they choose an allocation method from among those specifically authorized by Congress or approved by the PBGC.

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[26] In addition to the First Circuit, every other court of appeals that has considered the question presented in this case has recognized that many of the trustees' duties in assessing withdrawal liability are limited by statute. See *Bd. of Trustees* v. *Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1403 (9th Cir. 1984), cert. denied, 471 U.S. 1054 (1985); *Washington Star Co.* v. *Int'l Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1511 (D.C. Cir. 1984); *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 725 F.2d 843, 855 (2d Cir.), cert. denied, 467 U.S. 1259 (1984); *Republic Industries, Inc.* v. *Teamsters Joint Council No. 83*, 718 F.2d 628, 640 n.13 (4th Cir.), cert. denied, 467 U.S. 1259 (1984).

Second, trustees neither make "determinations of appropriate discount rates" (J.S. App. 25a-26a) nor decide what other actuarial assumptions to employ. Instead, the plan's *actuary* selects the assumptions, including the appropriate discount rates, and the Act requires that the assumptions be reasonable and reflect the *actuary's* best professional judgment concerning the plan's anticipated experience. 29 U.S.C. 1393(a)(1). Because an actuary ordinarily is not a fiduciary to the plan (29 C.F.R. 2509.75-5 (Q and A D-1)) and has an express legal obligation to adhere to prescribed ethical standards (20 C.F.R. 901.20), the delegation of authority to the actuary eliminates even the speculative grounds for impermissible bias relied upon by the court of appeals.[27]

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[27] In its Motion to Affirm (at 3-4), Yahn suggested that actuaries are subject to irresistible pressures from plan trustees to maximize withdrawal liability. Yahn ignores the fact that an enrolled actuary may have his enrollment suspended or terminated if he "has failed to discharge his duties under [ERISA]." 29 U.S.C. 1242(b)(1). Cf. *Schweiker* v. *McClure*, 456 U.S. 188, 196-197 (1982). In the face of express legislative regulation of actuaries' conduct, far more is required than Yahn's generalized assumptions to justify striking down a federal statute. See page 38 note 29, *infra*. There is certainly no suggestion in this case that the Plan's actuary, Peat,

Calculation of a plan's unfunded vested benefits is directly dependent on the assumptions selected by the actuary. 29 U.S.C. 1393(c). The trustees must accept the actuary's determination of the plan's unfunded vested benefits (29 U.S.C. 1393, 1401) and the assumptions on which that determination is based. Any calculation of a plan's unfunded vested benefits that is not based on "the actuary's best estimate of anticipated experience under the plan" (29 U.S.C. 1393(a)(1)) is subject to displacement by the arbitrator. Indeed, in *Woodward Sand Co. and Operating Engineers Pension Trust*, 3 Empl. Ben. Cas. 2351 (1982) (Kaufman, Arb.), the only case known to us in which plan trustees rejected the actuary's choice of assumptions,[28] the arbitrator held that their withdrawal liability determination was unreasonable.

Against this statutory background, it was improper for the court of appeals to seize on the purported reasonableness of widely varying interest rate assumptions relied upon by the dissent in *Keith Fulton*, 762 F.2d at 1150 (Aldrich, J.) (see J.S. App. 18a, 26a), without any basis in the record of this case for doubting the reasonableness of the 6% interest assumption used by the Pension Plan's actuary.[29] Had the court inquired into actuarial practices, it would have discovered that a large percentage of actuaries use comparable interest rate assumptions for calculating unfunded vested benefits and

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Marwick, Mitchell & Co., was biased in favor of large assessments of withdrawal liability.

[28] See Hearing Br. of Operating Engineers Pension Trust 5-6, *In re Arbitration of Woodward Sand Co. and Operating Engineers Trust*, No. 269.

[29] Rather than relying on any facts in the record of this case, the court of appeals instead referred to statements in the dissenting opinion in *Keith Fulton*, 762 F.2d at 1150 (Aldrich, J., dissenting). The court below acted on the belief that the trustees in *Keith Fulton* "had selected a discount rate of 7.5% although expert testimony suggested that a rate of 14.5% would have been

that 6% is a very common rate.[30] In light of the role played by independent actuaries, therefore, the court clearly erred in concluding that "the trustees have wide and significant discretion" to determine appropriate discount rates (J.S. App. 25a).

The last area of purported discretionary decisionmaking criticized by the court of appeals was the application of statutory exemptions (J.S. App. 26a). Various sections of the MPPAA (29 U.S.C. 1383-1399 and 1405)

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reasonable" (J.S. App. 26a). It was inappropriate for the Third Circuit to rely on unsupported assertions of fact from a different case, particularly when the court in that case had made no such factual findings. In any event, the Third Circuit's apparent assumption that a pension plan might reasonably expect a consistent return of 14.5% on its investments is a fragile basis for declaring an Act of Congress unconstitutional.

Whatever the facts in *Keith Fulton*, moreover, there is no "expert testimony" on discount rates, or any other basis in the record in this case, for questioning the reasonableness of the 6% interest rate used by the Pension Plan. This Court has emphasized the need for a specific factual record in analyzing claims that a decisionmaker is unconstitutionally biased. See, *e.g.*, *Schweiker* v. *McClure*, 456 U.S. 188, 196 & n.10 (1982); cf. *Friedman* v. *Rogers*, 440 U.S. at 18-19. Here, the court of appeals' complete failure to identify specific decisions by the trustees demonstrating their supposed bias strongly suggests that the court had none of the kinds of evidence on which this Court has relied in evaluating decisionmaker bias in previous cases.

[30] *Liabilities Report* 25-26. In a sample of 91 pension plans, the *Liabilities Report* found that 80% of the plans used interest rates below 7%, and that the most common rate, used by 42% of the sampled plans, was 6%. *Id.* at 26. The *Liabilities Report* did cite trustees' desire to maximize withdrawal liability as one reason for the use of low interest rate assumptions, but numerous other reasons were given to support the same result. *Ibid.* In any event, it should be emphasized that the use of low interest rate assumptions for withdrawal liability purposes, like the use of low interest rate assumptions for funding purposes, promotes Congress's purpose of protecting plan participants' benefit expectations.

establish rules that may reduce or eliminate an employer's withdrawal liability under certain circumstances. Plan trustees determine, in the first instance, whether any of these provisions apply to a withdrawing employer. But, as Judge Seitz pointed out in dissent (J.S. App. 40a), consideration of the relevance of these exemption determinations to the due process inquiry would be inappropriate in this case because Yahn failed to preserve its challenge to the determinations made by the trustees.[31] There is thus no basis in the record for evaluating the trustees' application of the exemption provisions, and the court of appeals should not have relied on this component of the withdrawal liability calculation as a basis for voiding an Act of Congress. See page 38 note 29, *supra.*

Even if Yahn had properly preserved its challenge to the trustees' determinations with respect to statutory exemptions, its attack on the presumption of correctness would be insubstantial, because the application of many of the statutory exemptions to withdrawal liability is largely a matter of legal interpretation.[32] The PBGC has concluded that the trustees' legal determinations are *not* entitled to the presumption of correctness in arbitration. In the preamble to its proposed regulation on arbitration of disputes in multiemployer plans, the PBGC explained (48 Fed. Reg. 31256 (1983) (proposed rule) (emphasis added)):

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[31] In its initial request for review of the liability assessment, Yahn did contend, *inter alia*, that it was entitled to have its liability reduced because (1) Yahn allegedly had no liquidation value and had sold all or substantially all of its assets in an arm's length transaction (see 29 U.S.C. 1405(a)) and (2) the buyer of Yahn's assets also hired some of its employees and made contributions on their behalf to the Pension Plan (cf. 29 U.S.C. 1384). But these contentions were not pressed in the ensuing litigation. In the court of appeals, for example, Yahn based its due process challenge solely on the actuarial assumptions used by the Pension Plan, which it termed the "crucial and elastic component of the liability calculation" (Br. for Appellants 38; see also *id.* at 39).

[32] That is clearly the case with respect to Yahn's now-abandoned contention that it was entitled to relief as a liquidating employer under 29 U.S.C. 1405. The Plan disagreed, contending that the statutory provision was to be applied to the entire group of trades or businesses under common control with Yahn (the Yahn Group) (C.A. App. 114), and that the exemption did not apply because

> In determinations that involve issues of both law and fact, the arbitrator shall separate the two issues and apply the presumptions set forth above and in [29 U.S.C. 1401(a)(2)] only to factural [*sic*] determinations. The regulation makes clear that the presumptions in [29 U.S.C. 1401(a)(2)] apply to factual issues but that *the arbitrator should not attach any presumptions to legal determinations by the plan sponsor.*

See also 29 C.F.R. 2641.4(a) (final rule).[33]

Assuming, arguendo, that Yahn's assertion of entitlement to relief under the statutory exemptions had raised factual questions for the arbitrator, it nonetheless was reasonable for Congress to place the burden of proof on Yahn. As the legislative history explains (126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson) (emphasis added)):

> [Section 1405] imposes specified limitations on withdrawal liability in certain circumstances. Generally, *the existence of these circumstances is peculiarly within the knowledge of the withdrawing employer.* It is therefore intended that, in the absence of clear showings by the withdrawing employer as to the applicability and extent of the limitations, a plan may assume that the limitations do not apply.

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the entire Yahn Group was not in liquidation. That is plainly a legal dispute over the meaning of "employer" as that term is used in Section 1405.

[33] Although the discussion of presumptions was removed from the final rule, the preamble states that the rule's silence on presumptions does not reflect any change in the PBGC's position. 50 Fed. Reg. 34681 (1985) (final rule).

See *Ponte* v. *Real*, 471 U.S. 491, 499 (1985); *United States* v. *New York, N.H. & H.R. Co.*, 355 U.S. 253, 256 n.5 (1957).

Because the presumption of correctness is limited to the trustees' factual determinations and, even then, may be overcome if an employer shows by a preponderance of the evidence that a determination was unreasonable, the trustees' discretion in initially applying the statutory exemptions from withdrawal liability does not violate procedural due process. The effect of the presumption is "not to insulate the trustees' determinations from effective review, but rather to require the trustees affirmatively to provide some support for the reasonableness of their determinations in the event that the employer introduces evidence to the contrary." *Washington Star Co.* v. *Int'l Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1511 (D.C. Cir. 1984). Thus, even if this limited aspect of trustee discretion were properly before the Court, it would survive constitutional scrutiny.

D. The Rule Mandated By The Court Of Appeals Would Frustrate Congressional Intent By Draining The Resources Of Multiemployer Pension Plans And The PBGC's Financial Assistance Fund.

The harm caused by the court of appeals' erroneous decision extends far beyond invalidating an important feature of an Act of Congress. Because the court's ruling requires de novo arbitration proceedings in any case in which an employer disputes its withdrawal liability, the decision inevitably will increase the number and scope of arbitration proceedings, interfere with the timely and efficient collection of withdrawal liability intended by Congress, and threaten the resources of multiemployer plans and the PBGC's financial assistance fund.[34]

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[34] The PBGC has a clear proprietary interest in the timely and efficient collection of withdrawal liability. Under 29 U.S.C. 1431, the PBGC, upon receipt of an application from a plan, provides financial assistance to enable the plan to pay basic benefits. Plans

As of 1982, there were approximately 2,500 defined benefit multiemployer plans in existence, covering more than 8.7 million participants.[35] A report to Congress analyzing a small sample of plans found that thousands of employer withdrawals occurred in a period of less than four years. *Liabilities Report* 42 (reviewing 2,868 withdrawals). Given the number and frequency of employer withdrawals, the potential for increased arbitration is enormous. If de novo arbitration proceedings were required for even a few hundred of these withdrawals annually, the administrative burden on multiemployer plans would be immense. See UMW Pension Plan Am. Br. 3-5. And if the plans were required to pay half of the arbitration costs, those costs alone would cause a significant drain of assets from plans already in financial difficulty. See *id.* at 3 (pension plan's legal fees for a typical arbitration range from $20,000 to $50,000).

This increased burden on multiemployer plans and the PBGC is not necessary to preserve the due process rights of withdrawing employers. As the First Circuit recognized in *Keith Fulton*, 762 F.2d at 1143 (quoting *Dorn's*

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receiving such assistance must repay the PBGC. Any increase in the number and scope of arbitration proceedings will increase the plans' costs, thereby reducing the likelihood and the amount of repayment to the PBGC. For example, the Anthracite Health and Welfare Fund, a major multiemployer plan covering Pennsylvania coal miners, has received approximately $2 million in financial assistance from the PBGC under 29 U.S.C. 1431. The PBGC's financial assistance loans to the plan are secured in part by the plan's collections of withdrawal liability. The plan recently recovered several hundred thousand dollars in withdrawal liability from a single employer, resulting in a repayment to the PBGC of over $160,000. Other withdrawals are expected from that plan. De novo arbitration proceedings for every assessment of liability by that plan could significantly increase the plan's costs for collecting liability and, consequently, reduce the repayment of financial assistance loans to the PBGC.

[35] Comptroller General of the United States, GAO/HRD-85-58, *Effects of the 1980 Multiemployer Pension Plan Amendments Act on Plan Participants' Benefits* 1 (1985).

Transp., Inc., 578 F. Supp. at 1239), "[w]e do not think due process requires this much. Congress apparently recognized the imprecision of forecasting a plan's financial future, and created the presumptions to avoid 'lengthy, futile and costly bickering over the adequacy of the [actuarial] methods chosen.'" It was the "futil[ity]" of the search for the "correct" actuarial assumptions that compelled Congress's decision to deny withdrawing employers an opportunity to challenge reasonable actuarial assumptions on the basis that the "correct" assumptions would have yielded their "true" liabilities. See *Senate Labor Summary* 20-21. Congress intended to eliminate incentives for employers to engage in litigation brought only in the hopes of "[slipping] a marginal case for another amount past a sympathetic arbitrator." *Keith Fulton*, 762 F.2d at 1145.

Considered in the abstract, a decisionmaking procedure that seeks the "true" amount one party must pay to another has obvious appeal. But Congress determined that, in the real-world setting faced by multiemployer plan actuaries, attempting to forecast their plan's economic fortunes far into the future, such an exercise would yield neither precision nor fairness. No matter how diligent the search among "equally 'correct'" actuarial methods, the ultimate selection would be no better than the one reached by experienced actuaries applying their best professional judgment.[36] Congress recognized, however, that the search itself would impose disproportionate burdens on plans and cripple their ability to collect withdrawal liability. A procedure aimed at reaching the "fairest" result to employers would instead be unfair to plans—

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[36] In *Keith Fulton*, 762 F.2d at 1143, the court noted the employer's concession that the nature of the "actuarial art" enables plan sponsors to choose from a wide range of "reasonable" assumptions and stated: "We think this factually compelled concession gives the game away. [The employer] concedes there are several 'correct' methods, yet insists it is entitled to a better 'correct' method than the Fund chose."

and thus, of course, to the plan participants and beneficiaries for whom the Act was passed.[37]

Moreover, employers' hopes of escaping or greatly reducing withdrawal liability by challenging the plans' actuarial assumptions could undermine Congress's basic purpose of encouraging employers not to withdraw but to remain in their plans. And, as one employer representative stated in testimony before Congress (*The Multiemployer Pension Plan Amendments Act of 1979: Hearing Before the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 97 (1980) (statement of the Food Marketing Institute)):

> Withdrawal liability only works if it is paid, and therefore the obligation to pay withdrawal liability should be enforceable. Incentives to dispute the liability and tie up the plan in expensive and time-consuming litigation should be minimized.

Given this threat to plan stability posed by the prospect of interminable litigation, it was indisputably rational for Congress to respond by enacting litigation-dampening

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[37] Congress was generally concerned about the costs inflicted on multiemployer plans by intransigent employers (126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson)):

> Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans * * * [including loss of investment income, administrative costs in collection efforts, and attorneys' fees and other legal costs].
>
> These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability for all employers. * * *
>
> These same principles apply to a plan's claim for employer withdrawal liability assessed in accordance with this legislature [*sic*].

presumptions. As this Court has recognized, "[o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Lavine* v. *Milne*, 424 U.S. 577, 585 (1976). This is particularly true in the case of presumptions "involving matters of economic regulation." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976). Accordingly, the court of appeals erred in holding that Section 104(2) of the MPPAA violates the Due Process Clause of the Fifth Amendment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

John H. Falsey
Acting General Counsel

Peter H. Gould *
Deputy Assistant General Counsel

David F. Power
Lonie Hassel
Attorneys
Pension Benefit Guaranty Corporation
2020 K Street, N.W.
Washington, D.C. 20006
(202) 778-8823

* *Counsel of Record*

Of Counsel:

Kenneth S. Geller
Kathryn A. Oberly
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

Mitchell L. Strickler
3803 Gramercy Street, N.W.
Washington, D.C. 20016
(202) 244-1072

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APPELLEE'S

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⑦ ④

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In The
Supreme Court of the United States
October Term, 1986

Pension Benefit Guaranty Corporation,
and
United Retail & Wholesale Employees Teamsters
Union Local No. 115 Pension Plan, *et al.*,
Appellants,
v.
Yahn & McDonnell, Inc., and
The Pennstar Company,
Appellees.

On Appeal from the United States Court of Appeals
for the Third Circuit

BRIEF FOR THE APPELLEES

Carl L. Taylor *
Glenn Summers
Kenneth N. Bass
Leslie M. Berger
Kirkland & Ellis
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000

William H. Ewing
Hangley Connolly Epstein
Chicco Foxman & Ewing
1429 Walnut Street
14th Floor
Philadelphia, PA 19102
(215) 864-7700

Counsel for Appellees
Yahn & McDonnell, Inc. and
The Pennstar Company

Dated: March 9, 1987

* Counsel of Record

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QUESTION PRESENTED

Can Congress, consistent with the Due Process Clause of the Fifth Amendment, give a "presumption of correctness" to a private party's determination of another private party's liability where the favored party has a legal duty and personal interests that conflict with a neutral and detached determination?

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

Nos. 86-231, 86-253

PENSION BENEFIT GUARANTY CORPORATION,
and
UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN, *et al.*,
Appellants,
v.
YAHN & MCDONNELL, INC., AND
THE PENNSTAR COMPANY,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE APPELLEES

STATEMENT OF THE CASE

A. Statutory Background

Under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA" or "the Act"), 29 U.S.C. §§ 1381-1461 (1982 & Supp. II 1984), an employer who "withdraws" from a multiemployer pension plan must pay a portion of the plan's unfunded vested benefits. Such plans are set up through collective bargaining agreements between employers and labor unions. *See* Labor-Management Relations Act of 1947, § 302(c), 29 U.S.C.

§ 186(c) (1982). Employers typically make contributions at a fixed rate specified in the collective bargaining agreement and have no contractual obligation for benefits beyond that commitment.[1] Decisions regarding benefit levels and criteria are vested in the trustees of the plan, and the individual employer typically has no control over those decisions.[2] The liability imposed by the MPPAA is thus noncontractual and arises solely by operation of statute. As the Seventh Circuit stated: "Liability under the MPPAA is not a contractually or pri-

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[1] Pension Benefit Guaranty Corporation, *Multiemployer Study Required by P.L. 95-214*, at 2-3 (July 1, 1978): "In most instances an individual employer's obligation to contribute to the plan and its involvement with the plan has been limited to making the contributions required under the collective bargaining agreement regardless of whether those contributions prove sufficient to provide the benefits established by the joint board." *See also* United States Department of Labor, *The Funding Status of Multiemployer Pension Plans and Implications for Collective Bargaining* at 15 (1985):

> The distinguishing characteristic of defined benefit multiemployer plans is that the collective bargaining agreement typically provides for the individual employer in the plan to contribute a specified amount of money to a central fund on the behalf of employees. Determination of the benefits is left to the discretion of a joint employer-union board of trustees.

[2] *See Sinai Hospital of Baltimore* v. *National Benefit Fund*, 697 F.2d 562 (4th Cir. 1982) (provision in collective bargaining agreement limiting increase in benefits not bar to trustees' increase); *NLRB* v. *Local 582, International Bhd. of Teamsters*, 670 F.2d 855 (9th Cir. 1982) (refusal by employers to agree to specific benefit in collective bargaining did not preclude multiemployer welfare fund from granting benefit).

The Trust Agreement for the Central States, Southeast and Southwest Areas Pension Fund ("Central States Fund")—the largest multiemployer pension plan—is typical in its express limitation of an employer's control and responsibility for the actions of the trustees: "Upon transfer of each contribution to the Trustees, all responsibilities of the Employers for such contributions shall cease, and the Employers shall have no responsibilities for the acts of the Trustees." Revised and Amended Trust Agreement, art. XIV, § 1.

vately created burden, rather it is imposed by law . . . ." *Peick* v. *PBGC*, 724 F.2d 1247, 1277 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). *See generally Connolly* v. *PBGC*, 106 S. Ct. 1018, 1029-31 (1986) (O'Connor, J., concurring). The amount of the liability can exceed the employer's net worth.[3]

The determination of withdrawal liability is given in the first instance to the pension plan. 29 U.S.C. § 1382 (1982).[4] To calculate liability, the plan must determine whether a withdrawal has occurred and then allocate to the employer a portion of "unfunded vested benefits," *id.* § 1381(b) (1982); *i.e.*, the difference between the present value of the pension fund's assets and its future vested payout obligations. *Id.* § 1393(c) (1982). Determining unfunded vested benefits requires numerous actuarial assumptions concerning such matters as mortality, retirement ages or rates, expenses, investment return, and withdrawal rates. 9 Pension Reporter (BNA) No. 396, at 814 (June 7, 1982). *See generally* D. McGinn, *Actuarial Fundamentals for Multiemployer Plans* 25-31 (1982).

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[3] *See* Interview with Arthur H. Bunte, Jr., Employer Trustee of Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds, in *1985 Annual Report of the Trustees* at 8: "Deregulation [of the trucking industry] severely threatened weaker companies. Many of them couldn't afford to sell or go out of business because their withdrawal liability . . . often was greater than [their] assets."

[4] Section 1382 states:

> When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part, shall—
>
> (1) determine the amount of the employer's withdrawal liability,
>
> (2) notify the employer of the amount of the withdrawal liability, and
>
> (3) collect the amount of the withdrawal liability from the employer.

The Act permits a pension plan to use its own assumptions so long as they "in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations)." 29 U.S.C. § 1393(a)(1) (1982). Complete data are not required in making these determinations:

> [T]he plan actuary may . . . in the absence of complete data, rely on the data available or on data secured by a sampling which can reasonably be expected to be representative of the status of the entire plan.

Id. § 1393(b)(2).

Once the plan determines the employer's allocated portion of unfunded vested benefits,[5] it must then determine whether one of a number of statutory exemptions reduces or eliminates the liability. The plan then notifies the employer of the amount of the assessment.

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[5] The statute prescribes four methods for allocating unfunded vested benefits: the presumptive method, the modified presumptive method, the rolling five method, and the direct attribution method; the plan determines which to use. 29 U.S.C. § 1391 (1982). The first three methods assign the employer a portion of unfunded vested benefits based on the ratio of the employer's previous contributions to the total contributions. The direct attribution method, which is little used by pension funds, assigns the employer the unfunded vested benefits of his own employees plus a portion of the unfunded vested benefits of other employers' employees.

Under the first three methods, there is no necessary connection between the amount of withdrawal liability and the amount necessary to fund the benefits for the employer's own employees; withdrawal liability therefore often goes to support the benefits of other employers' employees. Indeed, withdrawal liability is assessed even if an employer's previous contributions were sufficient to fund completely the vested benefits of the employer's own employees. *See Multiemployer Pension Plan Stabilization Act of 1981: Hearings on S.1748 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 97th Cong., 2d Sess. 57 (1982) (statement of James H. Hunt, President, Bangor Punta Marine); *id.* at 73 (statement of Dennis L. Hansen, Secretary and Treasurer, Ramsey Winch Company).

If the employer disputes certain of the plan's factual determinations, he must take the dispute to arbitration. In arbitration, the plan's findings of fact are presumed correct:

> For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

29 U.S.C. § 1401(a)(3)(A) (1982). In addition, the plan's actuarial assumptions and methods for determining unfunded vested benefits are to be presumed correct. *Id.* § 1401(a)(3)(B). These presumptions carry over into a review by a federal district court, where "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." *Id.* § 1401(c).

B. Factual Background

Appellee Yahn & McDonnell, Inc. ("Yahn") renewed in December 1980 its collective bargaining agreement with Teamsters Union Local 115 ("the Union"). Under the terms of that and prior agreements,[6] Yahn agreed to make specified weekly contributions to the Union's ERISA pension plan, appellant United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan ("Plan"), on behalf of all Yahn employees represented by the Union.

As is typical of such agreements (*see* notes 1-2 *supra* and accompanying text), Yahn's contractual obligation was limited to making the specified contributions, and the agreement itself did not provide for the imposition of withdrawal liability. *See* JS 6a.[7] As is also typical, the individual employer had no control over the administration of the Plan: "The Pension Plan shall be administered solely by the Trustees, and the decisions of the Trustees in all matters pertaining to the administration of the Pension Plan shall be final." United Retail and Wholesale Employees Union Local No. 115 Joint Pension Plan, art. VIII, § 8.1 (as amended & restated Jan. 1, 1976).

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[6] The basic agreements were negotiated by a multiemployer bargaining group, the Philadelphia Association of Tobacco and Confectionary Distributors, of which Yahn was a member.

Yahn ceased operations in November 1981, thereby "withdrawing" from the Plan within the meaning of the MPPAA. The Plan demanded withdrawal liability totalling $457,779, an amount almost double the company's contributions for the years 1976-1980.[8] The Plan informed Yahn that the Plan would look to Yahn's parent company, appellee The Pennstar Company ("Pennstar"), for payment if Yahn could not pay. JS 7a. Yahn requested review of the assessment pursuant to the statute, *see* 29 U.S.C. § 1399(b)(2) (1982), and the trustees refused to alter the assessment after conducting the review. Yahn demanded arbitration, and the parties agreed to hold arbitration in abeyance pending resolution of the constitutional issues. JS 7a.

In April 1983, the Plan brought suit in the District Court for the Eastern District of Pennsylvania against Yahn seeking a withdrawal liability payment. *Id.* In addition to certain statutory arguments not relevant here, Yahn defended on the basis that the MPPAA denied it due process. The district court granted summary judgment against Yahn and held that the MPPAA does not violate procedural due process. The court below reversed, concluding that "because the trustees are biased and have significant discretion, and because their determination of liability is deferentially reviewed in arbitration and in district court, we believe MPPAA deprives employers of their constitutional right to a fair hearing." JS 28a. The court further concluded that declaring unconstitutional the presumption in section 1401(a)(3)(A) rescued the statutory framework's constitutionality. *Id.* 32a-33a.

SUMMARY OF ARGUMENT

The court below declared unconstitutional section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1401(a)(3)(A) (1982). The decision eliminates a critical element of unfairness from the procedures mandated by the MPPAA for the resolution of the withdrawal liability assessments made by multiemployer pension plans. Congress for reasons of "efficiency" expressly sought to limit employers' ability to defend against such assessments by insulating them through a presumption of correctness. The Act thus places extraordinary decisionmaking power in the hands of a private party with statutory duties and individual interests that are inconsistent with an impartial determination.

The Act's procedural requirements obstruct an employer's ability to obtain a fair, impartial, and objective assessment of his liability. The initial determination is given to the party that will receive the money, the pension fund. The fund trustees have a statutory duty to act solely in the interests of the fund's beneficiaries, and are subject to lawsuit if they fail to do so. *See NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329-30 (1981); 29 U.S.C. § 186(c)(5) (1982); 29 U.S.C. § 1132 (1982). The trustees are private parties, not appointed by the government nor directly regulated by the government in the withdrawal liability determination. Half the trustees represent employers staying in the fund, whose economic interests conflict with employers withdrawing from the fund, because the more money "stayers" collect from the "withdrawers," the more the "stayers" reduce their own future liabilities. The other half of the trustees represent the union, whose interest is in obtaining the most money from withdrawing employers for the benefit of the employees they represent. This partisan representation is legally mandated. *See* 29 U.S.C. § 186(c)(5) (1982).

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[7] References in this brief to appellant Pension Benefit Guaranty Corporation's ("PBGC") Jurisdictional Statement and accompanying appendix will be cited "JS ——"; references to appellant PBGC's Brief on the merits will be cited "PBGC Brief at ——"; references to the appellant Plan's Brief on the merits will be cited "Plan Brief at ——".

[8] Yahn made all required contributions under the contract and contributed over $260,000 for the years 1976-1980. *See* Appendix A hereto, at 10a (Plan's calculation for Yahn's withdrawal liability).

The statute gives the trustees broad discretion to put this systemic bias into effect. The trustees have the power to determine whether statutory exemptions and definitions apply, choose the actuary who will develop the actuarial assumptions to be used in calculating liability, and oversee the actuary's decisions.

The trustees' decision is then shielded in the review process, where the determination resulting from systemic bias is presumed correct both before the arbitrator and in subsequent judicial review. The express purpose of the presumption is to limit an employer's ability to defend himself and aid an outcome favorable to the pension fund.

The system does not provide either "a neutral and detached judge in the first instance," *Ward* v. *Village of Monroeville*, 409 U.S. 57, 61-62 (1972), or *de novo* review by an impartial and distinterested tribunal, *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980). The Act violates both the reality and the appearance of justice guaranteed by the due process clause.

ARGUMENT

I. THE TRUSTEES OF THE PLAN ARE INSUFFICIENTLY "NEUTRAL AND DETACHED" TO PERMIT THEM DECISIONMAKING POWER OVER AN EMPLOYER'S WITHDRAWAL LIABILITY.

Due process requires an impartial decisionmaker: "That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule." *Tumey* v. *Ohio*, 273 U.S. 510, 522 (1927). The principle is deeply rooted in Anglo-Saxon jurisprudence. The Magna Charta had a number of provisions designed to protect against tribunals biased in favor of the King. *See* Magna Charta ¶¶ 18, 19, 24, 38, 39, 45, 52, *reprinted in* 1 Del. Code Ann. at 1, 4-7 (1975).[9] English jurists consider the right to an unbiased decisionmaker one of the two elements of "natural justice." Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1269 n.10 (1975). Blackstone held that "tyrranical partiality of judges, justices, and other magistrates, in the administration and under the colour of their office" constituted a "crime of deep malignity." 4 W. Blackstone, Commentaries *140. Judge Friendly concluded that this Court's cases establish an unbiased tribunal as one of the three minimum criteria for due process. 123 U. Pa. L. Rev. at 1278-79.

In determining whether a decisionmaker is biased, there initially is a presumption of impartiality. *Schweiker* v. *McClure*, 456 U.S. 188, 195 (1982). The presumption "can be rebutted by a showing of conflict of interest or some other specific reason for disqualification." *Id.*

To rebut the presumption, the appellees here need only show that the decisionmaker is potentially subject to such disqualifying interests, not that the decisionmaker was actually biased.[10] *Aetna Life Ins. Co.* v. *Lavoie*, 106 S. Ct. 1580, 1587 (1986) (Court not required to decide whether decisionmaker "in fact . . . was influenced" by possible temptation to bias); *In re Murchison*, 349 U.S. 133, 136 (1955) (no need to show "actual bias"). Disqualifying interests can be pecuniary, *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973); *Tumey* v. *Ohio*, 273 U.S. at 523, or can occur where the combination of statutory duties with the quasi-judicial function may create the "possible temptation" for the decisionmaker to render his decision for partisan reasons, *see Ward* v. *Village of Monroeville*, 409 U.S. at 60.

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[9] For example, paragraph 24 of the Magna Charta provides: "No sheriff, constable, coroner, or other [of] our bailiffs, shall hold pleas of the Crown." Paragraph 45 provides: "We will not make any justices, constables, sheriffs, or bailiffs, but of such as know the law of the realm and mean duly to observe it."

Pension plan trustees determine in the first instance an employer's withdrawal liability. That determination cannot be presumed impartial under the application of the foregoing principles. The trustees are private parties with both statutory and individual interests that conflict with an unbiased determination of withdrawal liability.

A. The Trustees Are Biased as a Matter of Law.

As noted by the court of appeals, "all of the trustees, including those selected by employers, are fiduciaries of the fund, 29 U.S.C. § 1002(21)(a), and thus owe an *exclusive* duty to the fund." JS 22a (emphasis in original). This Court emphasized in *NLRB* v. *Amax Coal Co.*, 453 U.S 322, 329-30 (1981) (citations omitted):

> Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with "uncompromising rigidity."

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[10] Because the question is the existence of systemic disqualifying interests, not actual bias in the individual case, evidence from pension funds other than the party in this case appropriately can be considered to show the kinds of pressures that can affect trustees and to illustrate other aspects of the statutory scheme. This brief therefore presents such material where it may aid the Court in assessing the statute.

The trustees' fiduciary duty under ERISA is "'*more* exacting [than] the requirements of the common law of trusts relating to employee benefit trust funds.'" *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 105 S. Ct. 3085, 3098 n.17 (1985) (Brennan, J., concurring) (emphasis in original) (quoting *Donovan* v. *Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984)). Senator Williams, a co-sponsor of both ERISA and the MPPAA, emphasized that ERISA imposes "strict fiduciary obligations on those who exercise management or control over the assets or administration of an employee pension or welfare plan." 120 Cong. Rec. 29,929 (1974). Trustees are personally liable to the fund for breach of these "strict fiduciary obligations." 29 U.S.C. §§ 1109, 1132 (1982); *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 105 S. Ct. at 3098-90 & n.8.

This legal framework ensures that trustees exercise every effort to maximize the assets available to a pension plan, including decisions regarding withdrawal liability. The legislative history demonstrates that Congress expected pension plans, in enforcing the withdrawal liability provisions, to act as ordinary litigants concerned with "maximizing the total ultimate recovery":

> We do not intend to restrict plan sponsors' prudent exercise of judgment in administering the withdrawal liability provisions generally. It is expected that plan trustees will need to make practical collection decisions which are consistent with their fiduciary duties and characteristic of any responsible creditor concerned with maximizing the total ultimate recovery at supportable costs.[11]

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[11] 126 Cong. Rec. 23,288 (1980) (statement of Senator Williams, MPPAA co-sponsor).

Congress thus contemplated that plan trustees, as a consequence of their fiduciary duties, would act to maximize liability.[12] Individuals with such statutory duties cannot be presumed impartial in making quasi-judicial decisions. *See Schweiker* v. *McClure*, 456 U.S. 188, 195 (1982).

While Congress did state that failure to maximize withdrawal liability is not a per se violation of fiduciary duty,[13] the very fact that it can be a violation at all renders the trustees' decision something other than "neutral and detached." This Court has concluded that fear of lawsuit can improperly interfere with judicial decisionmaking. *Stump* v. *Sparkman*, 435 U.S. 349, 363-64 (1978); *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 646, 649 (1872). By the same token, a private party that *is* subject to lawsuit for his decisions cannot be presumed to act without considering the personal consequences.

The appellants argue that trustees in some instances may deem a reduction of liability in the fund's interest. PBGC Brief at 33-34; Plan Brief at 21. The constitutional standard is impartiality, however, and the speculative possibility that systemically partial trustees may nonetheless sometimes reduce liability does not meet that standard. As the court of appeals concluded, the speculation that "manifest bias will not always result in gross injustice to employers" does not save the statutory scheme:

> "It seems an odd principle to determine the permissibility of manifest bias by weighing the decisionmaker's conflicting interests in the scale of justice and finding which side predominates." [14]

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[12] The appellant Plan, though arguing that trustees are not "inevitably biased," Plan Brief at 19, acknowledges that "trustees are obligated by Congress to be biased in favor of pension plans," *id.* at 30.

[13] H.R. Rep. No. 869, pt. I, 96th Cong., 2d Sess. 67, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2935.

All else being equal, more money is better than less money when viewed from the perspective of the trustees' statutory duty. This statutory interest conflicts with a neutral determination of employer withdrawal liability.

B. The Trustees of a Pension Plan Have Individual Interests Inconsistent with a Neutral and Detached Determination.

By law, employers and employees must be "equally represented" in the administration of the pension fund. 29 U.S.C. § 186(c)(5) (1982). The dual role of both employer and employee trustees has inherent conflicts that preclude impartial withdrawal liability determinations.

1. *Employer Trustees.* Employer trustees necessarily represent companies who are not withdrawing from the fund. Because any increase in withdrawal liability will decrease the need for additional contributions from companies that do not withdraw, representatives of the staying companies have a conflicting pecuniary interest when they determine the liability of a withdrawing employer. That pecuniary interest should bar a statutory role as decisionmaker. *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973) ("[T]hose with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.").

The PBGC itself has acknowledged that the interests of staying employers are "materially different" from those of withdrawing employers. In responding to comments on its proposed arbitration provisions, the PBGC rejected a commenter's suggestion that arbitrators be

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[14] JS 23a (quoting *Keith Fulton & Sons, Inc.* v. *New England Teamsters Pension Fund, Inc.*, 762 F.2d 1137, 1149-50 (1st Cir. 1985) (Aldrich, J., dissenting)).

"preselected" before the initiation of arbitration. The PBGC stated that "the arbitrator would, in practice, almost always be imposed unilaterally by the plan sponsor [*i.e.*, plan trustees], a result entirely contrary to the PBGC's mandate to devise 'fair and equitable' procedures." 50 Fed. Reg. 34,679, 34,680 (1985). The PBGC further stated: "[T]here is no feasible means by which an arbitrator could be preselected by representatives of both the plan sponsor and the employers that will withdraw in the future (*whose interests are materially different from those of the employers who will not withdraw*)." *Id.* (emphasis added).

The PBGC's finding rebuts the Plan's claim that "trustees do not have any personal, financial stakes in the determination of withdrawal liability." Plan Brief at 22 n.12. The PBGC has already recognized that employer trustees have interests materially different from withdrawing employers, and recognized that these interests preclude employer trustees from making decisions implicating the fairness of the procedures under the MPPAA.

2. *Employee Trustees.* Employee trustees typically are leaders of the union that sponsors the pension plan. As such, the union trustees have every interest in obtaining the maximum amount of money for the benefit of their members from the non-withdrawing employer and no interest in treating neutrally the company that will no longer be employing those members. Moreover, union trustees have an adversarial, and sometimes antagonistic, relationship with the employers with whom they deal.

Here, for example, one of the two union trustees is John P. Morris, who at all material times also has served as Secretary-Treasurer of Local 115.[15] Mr. Morris signed

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[15] The other union trustee, James Smith, appears to be subordinate to Mr. Morris within Local 115. *See Radio Electric Service Co.*, 278 N.L.R.B. No. 78, ALJ Decision at 3 (1986).

on behalf of Local 115 the collective bargaining agreement with Yahn in 1980 that subsequently served as the basis for the imposition of withdrawal liability. Mr. Morris is also president of Teamsters Joint Council 53 and "is widely regarded as the most powerful union leader in Pennsylvania." [16]

Mr. Morris has held his position with Local 115 for a number of years. *See Fuchs* v. *Local 115, International Bhd. of Teamsters*, 427 F. Supp. 742, 744 (D. Conn. 1977); *Samoff* v. *Teamsters Local 115*, 338 F. Supp. 856, 862 (E.D. Pa. 1972).[17] Under Mr. Morris' leadership, the local's activities have involved the confrontational, combative, and sometimes bitter relations with employers not uncommon in the union-management arena, especially in the trucking industry. *See, e.g., Samoff* v. *Teamsters Local 115*, 338 F. Supp. at 861 (unlawful recognitional picketing by Local 115 "accompanied by threats, epithets and violence directed to the Company's management"); *Radio Electric Service Co.*, 278 N.L.R.B. No. 78, ALJ Decision at 2-4 (1986) (strike and unfair labor practice charges by Local 115 over employer failure to pay Christmas bonus); *Teamsters Local Union No. 115*, 224 N.L.R.B. 388 (1976) (unlawful recognitional picketing after decertification by company employees).

Perhaps Mr. Morris can put aside a lifetime of adversary relations with employers and become "neutral and detached" when making decisions as a trustee relating to employer withdrawal liability. But there is no basis for presuming so. The "possible temptation" to act for partisan reasons is the relevant inquiry. *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972). Such a temptation exists here. Because withdrawal liability usually represents the last opportunity to obtain money from an employer for the benefit of employees, one can only assume that a loyal union advocate would seek the highest amount.

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[16] Collins, *Union Eyes Staff at Penn*, Philadelphia Inquirer, Mar. 1, 1986, at B5.

[17] For a general description of Mr. Morris' career, see Fleeson, *The Toughest, Meanest Union Boss in Town*, Philadelphia Inquirer Magazine, Sept. 4, 1983, at 10.

The concern about lack of union trustee impartiality is compounded when the union trustees are involved in the underlying events that lead to the assessment of withdrawal liability. Withdrawal liability is one of the most significant clubs in the union arsenal in contract negotiations, because the liability is triggered if an employer is permanently unable to conclude a new contract. Union leaders who are also union trustees wield that club and may be tempted to do so for partisan reasons unrelated to plan management.

The series of cases involving T.I.M.E.-DC, Inc. ("TIME-DC"), a nationwide trucking company, demonstrate that this concern is not speculative. TIME-DC refused in 1982 to sign the National Master Freight Agreement because it needed economic relief in order to survive non-union competition fostered by the deregulation of the trucking industry. A strike ensued, and the company remains without a contract for many of its drivers. Despite the continued pendency of a labor dispute forestalling withdrawal liability, *see* 29 U.S.C. § 1398(2) (1982), several pension funds made withdrawal liability assessments and the company was forced to obtain injunctions against the claims.[18] The PBGC has acknowledged that these cases involved "assessments of withdrawal liability that the courts perceived as arbitrary at best and outrageous at worst." [19] Brief of *Amicus Curiae* PBGC at 8, *Central States, Southeast and Southwest Areas Pension Fund* v. *T.I.M.E.-DC, Inc.*, No. 86-1628 (5th Cir., filed Nov. 14, 1986).[20] In at least one of these cases, the plan trustees who made or permitted these "arbitrary at best and outrageous at worst" assessments were also union leaders involved in the collective bargaining relationship with TIME-DC,[21] and the motivation to pressure or punish TIME-DC with respect to its collective bargaining position is apparent in all the cases.

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[18] *See T.I.M.E.-DC, Inc.* v. *I.A.M. National Pension Fund,* 597 F. Supp. 256 (D.D.C. 1984), and 616 F. Supp. 400 (D.D.C. 1985); *T.I.M.E.-DC, Inc.* v. *New York State Teamsters Conference Pension & Retirement Fund,* 580 F. Supp. 621 (N.D.N.Y.), *aff'd per curiam,* 735 F.2d 60 (2d Cir. 1984); *T.I.M.E.-DC, Inc.* v. *Trucking Employees of North Jersey Welfare Fund, Inc.*, 560 F. Supp. 294 (E.D.N.Y. 1983).

If TIME-DC did permanently cease business, it would have an estimated total withdrawal liability of approximately $30 million owed to 27 multiemployer funds. *T.I.M.E.-DC, Inc.* v. *I.A.M. National Pension Fund,* 597 F. Supp. at 264.

[19] One court described the assessment before it as "inconsistent and irrational." *T.I.M.E.-DC, Inc.* v. *I.A.M. National Pension Fund,* 616 F. Supp. at 404.

The TIME-DC saga continues. In the past year, TIME-DC has been forced to obtain two additional injunctions, against the Central States Fund and against the Western Conference of Teamsters Fund. *See Central States, Southeast and Southwest Areas Pension Fund* v. *T.I.M.E.-DC, Inc.*, 639 F. Supp. 1468 (N.D. Tex. 1986); *T.I.M.E.-DC, Inc.* v. *Western Conference of Teamsters Pension Trust Fund, Inc.*, 7 Employee Benefits Cas. (BNA) 2124 (N.D. Cal. Sept. 5, 1986).

[20] The PBGC's acknowledgement there of trustee abuse of the withdrawal liability power contrasts sharply with its effort in this case to picture trustees as mere extensions of congressional will: "[I]t was entirely reasonable for Congress to entrust plan trustees and actuaries with certain legislative, policymaking functions in order to take advantage . . . of the trustees' institutional commitment to foster the statutory goals that led Congress to enact the MPPAA in the first place . . . ." PBGC Brief at 30.

[21] *T.I.M.E.-DC, Inc.* v. *Trucking Employees of North Jersey Welfare Fund, Inc.*, 560 F. Supp. at 297 & n.1. For example, Salvatore Provenzano served on the Board of Trustees of the Local 560 Fund, was President and Chief Executive of Local 560, and served on the Teamsters National Freight Negotiating Committee. *Id.*

Union trustees hold "'two practically and seriously inconsistent positions.'" *Ward* v. *Village of Monroeville*, 409 U.S. at 60 (quoting *Tumey* v. *Ohio*, 273 U.S. at 534). Such trustees are like the judge in *Offutt* v. *United States*, 348 U.S. 11, 17 (1954), who violated due process by ruling on an attorney's conduct in a contempt proceeding while "personally embroiled" in the underlying controversy. Just as that judge was not deemed "to represent the impersonal authority of law," *id.* at 16, so also union trustees cannot be deemed impersonal adjudicators of the liability of employers with whom they have adversarial relations.

C. The Private Character of the Trustee Position Further Underscores the Lack of Fitness to Act as Statutory Decisionmakers.

Pension fund trustees are private individuals, not government officials. Trustees are appointed and removed without government oversight, examination or regulation beyond the cumbersome vehicle of enforcement litigation. There is thus even less reason than in *Ward* or *Schweiker* v. *McClure*, where government officials were involved, to have confidence that they can act as impartial decisionmakers uninfluenced by personal considerations.

The unseemly history of multiemployer pension funds and their ties to organized crime underscores the dangers inherent in granting private individuals quasi-judicial powers. As Judge Irving Kaufman has found in his role as Chairman of the President's Commission on Organized Crime: "Traditionally, labor racketeering evoked images of relatively simple and direct extortion imposed by threats of strikes or physical force. *Today, however, it is just as likely to appear in the form of benefit fund manipulation* facilitated by the assistance of corrupt professionals such as lawyers, accountants, and bankers." [22]

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[22] Prepared Statement of Judge Irving R. Kaufman, *reprinted in* President's Commission on Organized Crime, *Organized Crime and*

The most documented example of organized crime domination of a pension fund involves the Central States Fund, which was the subject of extensive government investigations. One Commissioner of the President's Commission on Organized Crime stated on the record that for many years "the Central States Pension Fund was known within law enforcement circles and other circles as well, as the private bank of organized crime." [23] The Fund "loaned money to and invested in organized criminal endeavors." [24] The Fund and its trustees allegedly funneled hundreds of millions, perhaps billions of dollars to organized crime,[25] accounting at least in part for the Fund's huge unfunded liability of over $3 billion. Four of the Fund's former trustees have been

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Labor-Management Racketeering in the United States, Record of Hearing VI, at 650 (Apr. 22-24, 1985) (emphasis added) [hereinafter *Organized Crime Commission Record*].

[23] *Id.* at 609 (statement of Commissioner Manuel).

[24] *See Findings and Conclusions*, H.R. Rep. No. 177, 97th Cong., 1st Sess. 181 (1981).

[25] Details of the links between Central States and organized crime have been the subject of frequent government investigations. In the five-year period from 1976 to 1981 no fewer than eight congressional hearings were held concerning Central States' alleged misuse of funds to benefit organized crime. *See* Comptroller General of the United States, *Investigation To Reform Teamsters' Central States Pension Fund Found Inadequate*, app. IX, at 145-46 (GAO/HRD-82-13, Apr. 28, 1982). Those hearings included: *Investigation of Alleged Irregularities in the Operation of the Teamsters' Central States Pension Fund: Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. (July 1, 1976); *Federal Pension Law Enforcement in Case of Teamsters' Central States Pension Fund: Subcomm. on Oversight of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. (Mar. 14 & 15, 1977); *Federal Pension Law Enforcement in Case of Teamsters' Central States Pension Fund: Subcomm. on Oversight of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. (Apr. 5 & July 19-20, 1977); *The Teamsters' Central States Pension Fund: Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. (July 18-19, 1977); *Central States*

convicted, *Secretary of Labor* v. *Fitzsimmons*, 805 F.2d 682, 687 n.7 (7th Cir. 1986) (en banc), and the Fund is being operated pursuant to two consent decrees entered in the United States District Court for the Northern District of Illinois.[26]

The problem of corruption and malfeasance in multiemployer funds is not limited to Central States. For example, according to the Annual Report to Congress of the Pension and Welfare Benefits Administration for 1984—the latest available report—the Secretary of Labor filed suit that year against twelve union-sponsored employee benefit funds or their trustees for various acts of mismanagement and misuse of assets. The Secretary that year obtained court judgments, consent decrees, or criminal convictions against another seven funds or their trustees.[27]

The current executive director of Central States, who led the clean-up of the Fund, has cautioned that, because of lack of regulation, organized crime involvement in pension funds can be expected to continue: "[W]hen you find large blocks of money like this generally unregulated with not [sic] on-site examinations, the organized crime elements, the unsavory elements in this country

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Teamsters' Fund: Subcomm. on Oversight of the House Comm. on Ways and Means, 95th Cong., 2d Sess. (Mar. 22, 1978); *Central States Teamsters' Fund: Subcomm. on Oversight of the House Comm. on Ways and Means*, 95th Cong., 2d Sess. (July 17-18, 1978); *Central States Teamsters' Pension Fund: Subcomm. on Oversight of the House Comm. on Ways and Means*, 95th Cong., 2d Sess. (Mar. 24, 1980); *Teamsters' Central States Pension Fund: Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. (Aug. 25-26 & Sept. 29-30, 1980).

[26] *Organized Crime Commission Record* at 589-90 (testimony of George Lehr).

[27] *See* Pension and Welfare Benefits Administration, U.S. Dep't of Labor, *Employee Retirement Income Security Act, 1984 Report to Congress* at 3-9.

are going to pounce on them and they are going to be there." [28]

II. THE ACT GIVES TRUSTEES FULL POWER TO EFFECTUATE THEIR BIAS.

The foregoing discussion has shown that plan trustees cannot be deemed unbiased for purposes of performing a quasi-judicial decisionmaking role. The PBGC argues that nonetheless the calculation of withdrawal liability is essentially ministerial and that the trustees have no ability to put their bias into effect. An examination of a plan's powers under the Act demonstrates the contrary. The plan trustees have wide latitude to effectuate their bias both in the application of the statute and in determining the assumptions necessary for the calculation of withdrawal liability.

A. The Plan's Ability to Determine Whether to Apply Statutory Exceptions Gives Trustees the Power to Expand or Reduce Withdrawal Liability.

The numerical calculation of withdrawal liability is only a small part of the determination, as actuaries themselves have noted.[29] The presumption of correctness that was declared unconstitutional by the court of appeals applies to "any determination . . . under sections 1381 through 1399 of this title and section 1405." 29 U.S.C. § 1401(a)(3)(A) (1982). Among the factual matters potentially determinable under these sections are:

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[28] *Organized Crime Commission Record* at 599. Mr. Lehr similarly stated on camera in a recent televised news report on benefit fund abuse: "[I]t's not only the least regulated, it's the most abused body of money that exists in this country today. . . . The mobsters, the scumbags, the rip-off artists, what those people do is look for something where there is not good regulation, and they have found this area where there is not good regulation." *ABC World News Tonight* (Dec. 29, 1986). In that same report, a Labor Department spokesman stated on camera: "You have corrupt trustees and administrators, people with hoodlum affiliations managing these funds. . . . The size of the problem simply overwhelms those who are charged with conducting enforcement responsibilities." *Id.*

[29] In a Report by the Academy Task Force to the House Task Force considering the proposed legislation, the American Academy of Actuaries stated: "The manner of allocating the total unfunded

—whether a withdrawal has occurred, *i.e.*, whether an employer has "permanently cease[d]" having an obligation to contribute or "permanently cease[d] all covered operations." *Id.* § 1383(a).

—whether one of the industry exemptions applies (construction, entertainment, trucking, retail food). *Id.* §§ 1383(a)-(d), 1385(c).

—whether compliance with the sale of assets provision has been met, to protect such a sale from the imposition of withdrawal liability. *Id.* § 1384.

—whether there has been a "contribution decline" or a "partial cessation of the employer's contribution obligation," sufficient to trigger a partial withdrawal. *Id.* § 1385(a).

—whether a change in business form is to be considered a withdrawal. *Id.* § 1398(1).

—whether a sale of assets not complying with § 1384 reduces liability, and what the "liquidation or dissolution value" of the employer is for purposes of calculating the reduction. *Id.* § 1405(a).

—whether the liabilities of the employer exceed its assets, for purposes of applying the liquidation or dissolution provision. *Id.* § 1405(d).

That the presumption applies to factual determinations, rather than legal determinations,[30] only begs the

question. A fund has tremendous discretion in individual cases to determine that an exception or provision does or does not apply, even when it does not have access to information that permits it to make an informed determination. This individualized, case-specific decision

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vested liability to individual employers is not strictly an actuarial matter except in the details of calculation." *Multiemployer Pension Plan Amendments Act of 1979: Hearings on H.R. 3904 Before the Task Force on Welfare & Pension Plans of the Subcomm. on Labor-Management Relations of the House Comm. on Education & Labor*, 96th Cong., 2d Sess. 1503 (1979).

[30] The PBGC notes that it has concluded that the presumption does not apply to questions of law. *See* PBGC Brief at 39. The PBGC fails to note that under its arbitration rules the arbitrator need not distinguish between findings of fact and conclusions of law, 29 C.F.R. § 2641.7(a)(1) (1986), thus permitting confusion and argument as to the extent to which the presumption influences an award.

Section 2641.7(a)(1) was added at the behest of the organization that represents multiemployer plans, which argued that if arbitrators were enjoined to separate fact and law, "[t]he practical result . . . might be to eliminate the effect of the statutory presumption in many cases." *Comment Letter to Office of General Counsel, PBGC, from Robert A. Georgine, Chairman, National Coordinating Committee for Multiemployer Plans* at 10 (Sept. 6, 1983) (on file with PBGC).

Thus, while claiming to the Court that the effect of the presumption is limited because "many of the trustees' decisions concerning the applicability of exemptions will be subject to de novo review," JS 21, the PBGC appears to be taking administrative steps to reduce that likelihood.

It should also be noted that pension funds have not universally adopted the PBGC's position that the presumption only applies to factual determinations. In *I.A.M. National Pension Fund* v. *Cooper Industries, Inc.*, 635 F. Supp. 335 (D.D.C. 1986), the district court found that there were no facts in dispute and that the Fund's assessment was invalid as a matter of law. The Fund on appeal argued, *inter alia*, that the district court erred in not applying the presumption to the Fund's legal determination:

> Presumably because the court viewed the challenge raised by Cooper as raising a pure legal question, it conducted a *de novo* determination of that question. . . . Cooper was not entitled to prevail in the court below unless it overcame the presumption of correctness which the statute accords the Fund's withdrawal liability determination.

Brief of Appellants at 19, *I.A.M. National Pension Fund* v. *Cooper Industries, Inc.*, No. 86-7015 (D.C. Cir., filed Jan. 22, 1987).

can eliminate withdrawal liability altogether or impose liability without a proper basis.[31]

The potential for abuse is shown in the case law. In *T.I.M.E.-DC, Inc.* v. *New York State Teamsters Conference Pension & Retirement Fund,* 580 F. Supp. 621 (N.D.N.Y.), *aff'd per curiam,* 735 F.2d 60 (2d Cir. 1984), the Fund demanded withdrawal liability despite the company's demonstration that a labor dispute existed. The court found that one trustee misunderstood the relevant law and "at the very most none of the other Trustees was anything more than vaguely familiar with the labor dispute provision of the MPPAA." *Id.* at 625 & n.6.[32] Similarly, in *T.I.M.E.-DC, Inc.* v. *Trucking Employees of North Jersey Welfare Fund, Inc.,* "the Trustees had not heard of the 'labor dispute' exception to the MPPAA before their preparations for testimony." 560 F. Supp. 294, 299 (E.D.N.Y. 1983). Yet, had either assessment gone to arbitration, any factual component of the implicit "determination" that no labor dispute existed would have been presumed correct.

There is no basis in law or policy to shield such decisions from *de novo* review.

B. The Calculation of Withdrawal Liability Is Not a Ministerial Act, but Rather Has Discretionary Elements That Grant a Fund Broad Leeway to Maximize Liability.

The statute permits a fund broad discretion in the assumptions and data employed in the calculation of withdrawal liability, and the calculation is thus far

from ministerial. A fund may use any actuarial assumptions and methods, so long as they "in the aggregate, are reasonable." 29 U.S.C. § 1393(a)(1). The PBGC cannot require a fund to use any particular assumptions or methods. *Id.* § 1393(a). A fund need not obtain complete data, but rather may "rely on the data available or on data secured by a sampling which can reasonably be expected to be representative of the status of the entire plan." *Id.* § 1393(b)(2). These provisions permit wide variation among funds in the actuarial determinations.

The General Accounting Office's ("GAO") Report to the Congress, *Effects of Liabilities Assessed Employers Withdrawing From Multiemployer Pension Plans* (GAO/HRD-85-16, Mar. 14, 1985) [hereinafter *Effects of Liabilities*] confirms the extent of potential actuarial variation and indicates a critical view of the consequent possibility of inequitable liability assessments. The Report notes that assumptions can vary significantly among actuaries, yet "[*n*]*otwithstanding the variables inherent in the determination of a plan's withdrawal liability,* MPPAA provides that a plan's determination is presumed correct in disputes resulting in arbitration unless the employer can show that it is unreasonable or in error." *Id.* at 24 (emphasis added). The Report concludes:

> Notwithstanding the appropriateness of different actuarial assumptions for different plans, the calculations of a plan's unfunded actuarial liability involves considerable judgment by the actuary concerning future uncertainties. *Because of such uncertainties, the actuary's estimates of future returns on a plan's investments could result in determinations of liabilities that could be inequitable to the withdrawing employers.*[33]

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[31] The importance of fund power to apply statutory provisions is underscored by the PBGC's efforts to persuade the Court to ignore that power in evaluating the statutory scheme. *See* PBGC Brief at 38-39.

[32] The court also noted that "it appears that some trustees were wholly ignorant of why the Fund asserted withdrawal liability against TIME-DC." *Id.* at 625 n.6.

[33] *Id.* at 33 (emphasis added).

The potential for inequitable determination[34] identified by the GAO is especially severe because the determination is unalterable. Once an employer's withdrawal liability is calculated, there is no provision for changing the liability even if the fund's assumptions later prove in error.[35]

Actuaries themselves confirm the complexity of the withdrawal liability calculation and the potential variation in liability based on the assumptions used. The senior actuarial advisor on the policy and planning staff of the PBGC has noted "unanswered questions," "potential sources of controversy," and "theoretical incongruities" in the calculation of withdrawal liability.[36] Just how indefinite actuarial science can be is shown by the following excerpt from his article:

> Are the assumptions used to establish the charges and credits for the funding standard account appropriate for calculating the [value of vested benefits]? *Maybe.*[37]

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[34] Appellants argue that the fact that the selection of assumptions applies to all withdrawing employers supports the statutory scheme. PBGC Brief at 26-28; Plan Brief at 24-26. If the choice of assumptions leads to inequity to all withdrawing employers, it is hard to see how that is somehow better than inequity only to a particular employer.

[35] Feuer, *The Selection and Arbitration of Withdrawal Liability Interest Rates*, Employee Benefits J., Mar. 1985, at 23, 26 ("An employer's withdrawal liability is calculated once and not adjusted if subsequent events demonstrate that the underlying actuarial assumptions and methods were incorrect.").

[36] Amoroso, *Withdrawal Liability*, Employee Benefits J., June 1982, at 2, 4, 26.

[37] *Id.* at 4 (emphasis added). Funding assumptions are those assumptions used by the plan to estimate long-term contribution needs. *See* 29 U.S.C. § 1082 (1982) (ERISA minimum funding standards). The question of whether to use funding assumptions for purposes of determining withdrawal liability is one of the most critical in terms of the impact on the final amount, and, as

What is "maybe" appropriate to this actuary will nonetheless be "presumed correct" if enshrined in a plan's withdrawal liability assessment.

The PBGC's actuarial advisor concludes:

> Determining an employer's withdrawal liability is a complicated business, which is not exclusively in the technician's domain. Indeed, one of the purposes, here, was to underscore that point of view. "Theoretical" tradeoffs may be necessary to achieve equitable results envisioned by Subtitle E of Title IV; focusing exclusively on any one factor may not be appropriate.[38]

Thus, far from being a purely ministerial task, the actuary's determination involves sensitive and complicated questions of trade-offs, "not exclusively in the technician's domain." *See also* Brennan, *Multiemployer Plan Withdrawal Liability: An Actuary's View*, Pension World, Oct. 1982, at 41, 44 ("The actuary's role under MEPPAA is a difficult and precarious one.").

Because the actuary is retained by the plan, any discretionary trade-offs will usually be resolved in the plan's favor. If not, the plan is free to change actuaries or to employ its own actuarial assumptions.

The GAO Report *Effects of Liabilities* again demonstrates the extent of a plan's power. Perhaps the most important actuarial assumption is the interest rate assumed for calculating the future return on plan invest-

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noted by the PBGC's actuarial adviser, one of the areas most open to actuarial judgment. The PBGC noted to the GAO that "[b]ecause the assumptions used for plan funding calculations tend to err on the side of conservatism, these calculations may overstate unfunded vested liabilities." *Effects of Liabilities* at 72. To the Court, however, the PBGC claims that use of funding assumptions by two-thirds of pension funds is not evidence of bias. PBGC Brief at 28 n.20.

[38] *Id.* at 6.

ments. Actuaries have advocated five different types of interest rates,[39] and a plan's unfunded vested benefits can vary dramatically according to which is used. The GAO Report found a one percent change in the interest rate could change the value of vested benefits by eight to ten percent. The Report provided an example of one fund whose unfunded vested benefits went from $7,000,000 to $0 based on the interest rate used. *Id.* at 24, 29. The Report further noted: "*The [interest] rate may depend on the philosophy of the actuary or actuarial firm employed by the plan or on a decision of the plan's trustees.*" *Id.* at 24 (emphasis added).

The PBGC has confirmed that plan trustees have the final say over the actuarial assumptions used in the withdrawal liability calculation. In the preamble to its proposed arbitration rules, the PBGC stated: "[T]he joint board of trustees as plan sponsor of a multiemployer plan shall approve the actuarial assumptions upon which the plan's liabilities are calculated, including assumptions relating to mortality, interest, turnover, and administrative expenses." 48 Fed. Reg. 31,251, 31,252 (1983).

A memorandum produced in a different case demonstrates the interdependent relationship of a pension fund and its actuary and explodes the fiction propounded by appellants that the actuary "is a neutral decisionmaker." Plan Brief at 25; *accord* PBGC Brief at 36. An actuary with Martin E. Segal & Co., a major firm that is the consulting actuary for approximately one-quarter of all multiemployer plans,[40] wrote one of its clients, the Board of Trustees of the Marine Mates and Pilots ("M.M. &

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[39] Harrold, *Withdrawal Liability—Which Interest Rate to Use*, Int'l Found. of Employee Benefits Digest, June 1985, at 6, 6. The author identifies the rates as market rates, insurance company annuity purchase rates, PBGC rates, blended rates, and funding rates. The author further notes: "Combinations of these, of course, are possible." *Id.*

[40] *Effects of Liabilities* at 72.

P.") Pension Fund, concerning withdrawal liability. The actuary "urge[d] that we meet in the near future with Counsel and your Administrator to explore the procedures and substantive matters concerning the determination and collection of any withdrawal liability that can be presented to the Trustees for decision at your scheduled meeting next month." [41]

The actuary's suggested agenda of the matters to be "presented to the Trustees for decision" was as follows:

1. Notification required to all contributing employers.
2. Information to be provided on request—fees to be charged, if any.
3. Definition of "Withdrawal."
4. Identification of "employer" for withdrawal purposes (companies under "common control").
5. Calculation and collection of an employer's liability.[42]

There is certainly nothing improper about an actuary working with his client and seeking approval on major decisions regarding the withdrawal liability calculation. Indeed, it is entirely expectable. Nothing in the statute or in the economic relationship between a fund and the actuary makes the actuary anything other than what he normally is: the agent of his client.[43] Such an agent cannot, consistent with due process, be deemed a "neutral decisionmaker" of the fund's liability assessment.

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[41] Memorandum from Philip B. Polak to Board of Trustees, M.M. & P. Pension Fund (Apr. 8, 1981) (reproduced herein as Appendix B) (produced by Pension Fund in discovery in *In re Arbitration between Marine Transport Lines, Inc. & M.M. & P. Pension Fund*, No. 13621001085 (MEPP)).

[42] *Id.*

[43] The PBGC notes that an actuary may be suspended if he fails to discharge his duties under ERISA. 29 U.S.C. § 1242(b)(1) (1982); *see* PBGC Brief at 36 n.27. The evaluations of the PBGC's actuary and the GAO's *Effect of Liabilities* discussed before demon-

Funds are free to shop for the actuaries whose "philosophy" best fits their own[44] and to make decisions on the major elements of the liability calculation. But the employer is not permitted effectively to challenge either selection.

C. The Fund's Decision Is Adjudicative in Nature, Not "Legislative Policymaking."

Withdrawal liability in its simplest terms is a statutorily created debt,[45] a congressional mandate authorizing the transfer of large sums of money[46] from employers to pension funds. Through their powers to resolve initially statutory exemptions and to establish actuarial methods and assumptions, pension funds determine both the existence and the amount of that debt. There is no merit to the contention that this determination involves unreviewable "policy" decisions that are "legislative" rather than "adjudicative" in nature. *See* PBGC Brief at 19, 30.

The PBGC makes a far-fetched analogy to governmental decisions that involve weighing and balancing of competing public policy interests entrusted to administrative agencies. The cases relied on are inapposite here. In *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), the case involved the Department of Transportation's decision as to where to build a highway. In *Hortonville Joint School Dist. No. 1* v. *Hortonville Education Ass'n*, 426 U.S. 482, 495 (1976), the decision concerned a School Board's treatment of teachers who were admittedly on strike illegally, a matter which "was only incidentally a disciplinary decision; it had significant governmental and public policy dimensions as well." Moreover, the Court noted that the Board members—unlike the trustees here—"did not . . . ha[ve] the kind of personal or financial stake in the decision that might create a conflict of interest." *Id.* at 492. *Heckler* v. *Chaney*, 105 S. Ct. 1649 (1985), involved the decision

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strate that there is sufficient discretion under the statute to vary withdrawal liability significantly without running afoul of that provision. Indeed, given the trustees' duty to "be biased in favor of pension plans," Plan Brief at 30, an actuary arguably would run afoul of the statute if he did not make discretionary trade-offs in the plan's favor.

[44] The extent of the variation that can occur in actuarial assessment and the potential for "actuary-shopping" is illustrated by the different results the Central States Fund obtained from three actuarial firms during the period 1975-1977. The range of the dispute is perhaps best communicated by the GAO headings in its Report on this subject:

"First actuary indicated the Fund is financially sound."

"Second actuary states Fund is financially unsound."

"First actuary disagrees and states that IRS agrees the Fund is financially sound."

"Third actuary agrees with second that the Fund is not financially sound."

Comptroller General of the United States, *Investigation to Reform Teamsters' Central States Pension Fund Found Inadequate* 109-11 (GAO/HRD-82-13, Apr. 28, 1982).

[45] *See Connolly* v. *PBGC*, 106 S. Ct. 1018, 1029-31 (1986) (O'Connor, J., concurring); Statement of Sen. Williams, quoted at p. 11 *supra*.

[46] The statutory *minimum* for withdrawal liability is $50,000, 29 U.S.C. § 1389 (1982), far in excess of the minimum amount for federal court jurisdiction. Withdrawal liability assessments running into the millions of dollars are not uncommon. *See* note 18 *supra*; *Robbins* v. *The Pepsi-Cola Metropolitan Bottling Co.*, 636 F. Supp. 641 (N.D. Ill. 1986) (over $30 million in withdrawal liability claims), *appeal pending*, Nos. 86-1963, 86-1964, 86-2241 (7th Cir.); *The Flying Tiger Line, Inc.* v. *Central States, Southeast and Southwest Areas Pension Fund*, No. 86-304 (D. Del. Oct. 17, 1986) (over $36 million withdrawal liability claims), *appeal pending*, Nos. 86-5817, 86-5931, 87-3083 (3d Cir.).

by the Food and Drug Administration not to undertake enforcement actions.[47]

These are decisions by duly appointed governmental entities in broad policymaking areas. By contrast, withdrawal liability is the determination by private trustees —elected only by other trustees—of the amount of money employers will pay to the institution the trustees manage. This concrete resolution and assessment of liability is clearly an adjudicative matter.

The PBGC's argument proves too much. The logical outcome of the argument is that there should be no review at all of fund liability determinations. However, there is very definitely "law to apply" to fund determinations. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. at 413. Far from being unreviewable "legislative, policymaking functions,"[48] fund determinations are resolutions of monetary liability that should be tested through the impartial adversarial system guaranteed by due process.

III. UNDER THE STATUTORY SCHEME THE EMPLOYER AT NO POINT RECEIVES *DE NOVO* ADJUDICATION OF HIS WITHDRAWAL LIABILITY ASSESSMENT.

Due process requires that at some point a citizen has the right to a trial *de novo* before a neutral and detached decisionmaker. *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60-61 (1972); *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242-43, 245 (1980). *Ward* held that due process requires a neutral and detached judge in the first instance, and even *de novo* review does not protect the failure to do so.

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[47] *Friedman* v. *Rogers*, 440 U.S. 1 (1979), involved no administrative decision at all, but rather involved an attack on a state legislature's policy decision regarding permissible trade practices in the guise of attacking the State Optometry Board's composition. *See id.* at 7, 17-18.

[48] PBGC Brief at 30.

409 U.S. at 61-62. *Marshall* v. *Jerrico* held that where the initial determination of liability was placed with a party with enforcement rather than judicial responsibilities trial *de novo* "of all *factual* and legal issues" preserved the statutory scheme. 446 U.S. at 245 (emphasis added); *see also Withrow* v. *Larkin*, 421 U.S. 35, 58 (1975) ("substantial due process question would be raised" if "nonadversarial processes . . . foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision").

The pension fund trustees cannot be deemed impartial, and they have the duty and the power to maximize their assessments both in general and in individual cases. The MPPAA's shielding of this ex parte determination by an interested decisionmaker from *de novo* review through the presumption of correctness completes the deprivation of due process. At no point does an employer receive the trial *de novo* before an impartial decisionmaker guaranteed by the Constitution.

A. The Presumption of Correctness Unfairly Obstructs Impartial *De Novo* Review.

The influence of the presumption can be seen in arbitrations where the presumption is applied in talismanic fashion to resolve disputed questions of fact. *See, e.g.*, *Coal Drilling Services, Inc. & UMW 1974 Pension Plan*, 5 Employee Benefits Cas. (BNA) 1833, 1835 (1984); *UMW 1974 Pension Plan & Williamson Shaft Contracting Co.*, 6 Employee Benefits Cas. (BNA) 1593, 1604 (1985); *Hertz Corp. & Commission Drivers Local 187 Pension Fund*, 4 Employee Benefits Cas. (BNA) 1367, 1380-81 (1983); *Palmer Coking Coal Co. & UMW 1950 & 1974 Pension Plans*, 5 Employee Benefits Cas. (BNA) 2369, 2383 & n.6 (1984). In *Hertz*, the arbitrator resolved the disputed issue on the basis of the presumption even though the company's position had "a certain undeniable plausibility." 4 Employee Benefits Cas. (BNA) at 1381.

The arbitrator in *Palmer Coking* described the presumption as imposing "rigorous standards of arbitral review."[49]

That arbitrators have in some instances revised plan determinations does not prove that the system is fair, only that the unfairness does not guarantee a result adverse to the employer in every case. Presumably the Mayor of Monroeville did not impose a fine in every case that came before him. The appellees do not have the burden of showing "special prejudice in [the] particular case." Such a burden would "require[] too much and protect[] too little." *Ward* v. *Village of Monroeville,* 409 U.S. at 61. Appellees need only show a systemic deprivation of a fair, *de novo* hearing. *Cf. In re Murchison,* 349 U.S. 133, 136 (1955) ("[O]ur system of law has always endeavored to prevent even the probability of unfairness.").

The unconstitutional effect of the presumption is underscored by its uniqueness. Unlike other presumptions commonly written into statutes, this is not a "presumption" at all in the evidentiary sense of linking "Fact A" to "Fact B."[50] Congress here has not legislatively de-

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[49] 5 Employee Benefits Cas. (BNA) at 2383 n.6. Compounding the effect of the arbitral presumption is the review required of the courts. In a judicial review proceeding, the arbitrator's findings of fact are rebuttable only by a "*clear* preponderance of the evidence." 29 U.S.C. § 1401(c) (1982) (emphasis added). Theoretically, an employer could prove his case by a preponderance and still lose.

[50] *See Mobile, Jackson & K.C. R.R.* v. *Turnipseed,* 219 U.S. 35, 43 (1910) (presumption in civil statute constitutional so long as there is a "rational connection between the fact proved and the ultimate fact presumed"); *see, e.g., Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976) (coal mining presumed to cause black lung disease); *Mathews* v. *Lucas,* 427 U.S. 495 (1976) (illegitimate child entitled to presumption of dependency on decedent parent where parent evidenced relationship prior to death); *Atlantic Coast Line R.R.* v. *Ford,* 287 U.S. 502 (1933) (failure of railroad to

termined a particular fact, but attempted to favor a particular class of private parties in the adversarial process.[51] Congress intentionally was attempting to limit an employer's ability to defend himself against a fund's assessment. Congress intended that "[w]ithdrawal liability . . . be collectible upon notice and demand to the withdrawn employer by the plan sponsor," H.R. Rep. No. 869, pt. II, 96th Cong., 2d Sess. 29, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2993, 3018, which was consistent with the congressional purpose that pension funds "maximiz[e] the total ultimate recovery," statement of Sen. Williams, quoted at p. 11 *supra.*

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give crossing signals presumed to be proximate cause of crossing collision).

[51] The appellant Plan acknowledges this congressional favoritism but attempts to defend it by arguing that there is an analogy between trustees' determinations with respect to claims for benefits by participants—which are evaluated under the deferential "arbitrary and capricious" standard—and their determinations under the MPPAA. Plan Brief at 27-29. Because the trustees' fiduciary duty runs to beneficiaries, *see NLRB* v. *Amax Coal Co.,* 453 U.S. 322, 330 (1981), there is a legal basis for assuming that trustees will make decisions favorable to the beneficiaries absent evidence to the contrary. With withdrawal liability, trustees inherently have an adversarial relationship and such deference is therefore inappropriate.

Moreover, as the various cases cited by the Plan recognize, trustee determinations with respect to benefit claims are reviewed under the deferential arbitrary and capricious standard because they depend on the trustees' "readings of the plans they administer." *Richland Industries, Ltd.* v. *Robbins,* 617 F. Supp. 639, 646 (N.D. Ill. 1985). By contrast, withdrawal liability requires the application of a supervening statute to fact situations where the trustees may have no expertise or may have no information whatsoever. There is thus no basis for deference. *Cf. id* at 646 (principle that courts should defer to the trustees' administration and interpretation of plan rules regarding benefits "does not extend to the interpretation of statutes, a task for which trustees are scarcely suited as experts generally").

Congress instituted the presumption in the belief that it was necessary "to ensure the enforcability [sic] of employer liability," on the rationale that employers "could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element in making an actuarial determination."[52] The rationale is neither supported in the legislative history nor supportable. First, that rationale provides no basis for applying the presumption to statutory determinations, determinations that can have a greater effect on the ultimate liability of individual employers than the actuarial calculation. *See* pp. 21-24 *supra*. Second, because the employer bears his own expenses and is subject to sanctions for raising unreasonable or frivolous claims, *see* 29 C.F.R. § 2641.9 (1986), there is no greater likelihood of employer delay "nullifying" the underlying obligation than in any other kind of litigation.

More important, the very fact that there can be a range of actuarial judgments supports the conclusion that an employer should have the opportunity to present his positions to a genuinely neutral and disinterested decisionmaker uninfluenced by a congressional mandate to favor one party over another.[53] Large amounts of money are at stake,[54] which often represent all that an employer has.

The claimed need for "efficiency" cannot outweigh the right to an impartial adjudication. There is no support in the case law for appellants' implicit assertion to the contrary. Due process is always in some sense "inefficient," but due process cannot be denied merely because the opposing party would like an easier road than a fair hearing leading to an impartial adjudication.

B. The MPPAA Procedural Scheme Violates the Perception of Justice.

The MPPAA procedural scheme, in conjunction with the underlying substantive imposition of the liability, violates the fundamental precept that "justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14 (1954); *see also Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 594 (1980) (Brennan, J., concurring) ("For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably."). The principle of neutrality "preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.'" *Marshall* v. *Jerrico*, 446 U.S. at 242 (quoting *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).[55] The MPPAA does not generate that feeling.

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[52] H.R. Rep. No. 869, pt. I, 96th Cong., 2d Sess. 86, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2954; *see also* Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Considerations* 20-21 (Comm. Print 1980).

[53] This is the critical point of departure for the First Circuit's *en banc* decision in *Keith Fulton & Sons, Inc.* v. *New England Teamsters & Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137 (1st Cir. 1985). The court there acknowledged that "the trustees came to their task of calculating withdrawal liability with a bias," *id.* at 1140, but believed that Congress constitutionally could permit a biased determination among the range of alternatives. *See id.* at 1143-44. The court's argument confuses the due process guarantee of an impartial decisionmaker with the underlying merits question. Appellees are entitled to an impartial review of that concededly biased determination. Significantly, neither of the appellants attempts to justify the MPPAA presumption with the argument advanced by the *Keith Fulton* court.

[54] *See* note 46 *supra*.

[55] Studies have shown that the perception of procedural fairness is critically related to the presence of a "demonstrably independent decisionmaker." J. Marshaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil & M. Carrow, *Social Security Hearings and Appeals*, at XXIV (1978); *see also* Verkuil, *A Study of Informal Adjudica-*

The employer faces a liability that can exceed his net worth. That liability is imposed by statute despite the employer's agreement in arms-length bargaining to make specified and limited contributions, and the liability can far exceed the contributions the employer agreed to make.[56] The employer did not create the plan underfunding that forms the basis of the liability, nor did he have any ability to control the decisions that led to the underfunding. *See* p. 2 *supra*. The assessed liability does not necessarily go to fund the benefits of his own employees. The employer must begin paying the liability before he even receives a resolution of the amount. 29 U.S.C. § 1399(c)(2) (1982).

The determination of this noncontractual liability is made by the trustees who *were* responsible for plan underfunding[57] and who will receive the money. Half of the trustees are former competitors with a pecuniary interest in maximizing liability to reduce their own contributions, and half are union trustees with an interest in maximizing the money available for benefits to union members. Their determination is then treated with a "presumption of correctness" for the express purpose of "dampening"[58] the employer's effort to obtain an unbiased review through the normal adversarial process.

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tion Procedures, 43 U. Chi. L. Rev. 739, 751 (1976). As the court of appeals succinctly noted, " 'even a dog distinguishes between being stumbled over and being kicked.' " JS 20a (quoting O. Holmes, *The Common Law* 3 (1881)).

[56] Here, appellees' assessed liability is almost double the contributions made in the prior five years. *See* note 8 *supra* and accompanying text.

[57] The essence of plan underfunding is the failure to match promised benefits to expected contributions, which is the responsibility of the trustees. *See Connolly* v. *PBGC*, 106 S. Ct. 1018, 1030 (1986) (O'Connor, J., concurring).

[58] *See* PBGC Brief at 44-45.

In the vivid image of Judge Aldrich, the employer

> finds himself, without possibility of relief, in a boxing ring from which he had been told he might be exempt, the prize being his own money, in an uneven match, but assured by the referee that he would see to it that it was a fair fight. Although not put in exactly those terms, the justification offered for this is that it was his own fault for associating with people like that, and his opponent needs the money.[59]

Due process is really nothing more than ensuring that there is indeed a "fair fight." While many problems and controversies remain with the MPPAA, removing the presumption of correctness at least gives the employer an even opportunity to contest fund determinations, returning some sense of justice in accordance with "the deep-rooted demands of fair play enshrined in the Constitution." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. at 161 (Frankfurter, J., concurring).

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[59] *Keith Fulton & Sons, Inc.* v. *New England Teamsters & Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137, 1146 (1st Cir. 1985) (en banc) (Aldrich, J., dissenting).

CONCLUSION

For the foregoing reasons, the appellees respectfully request that the judgment of the court of appeals be affirmed.

Respectfully submitted,

CARL L. TAYLOR *
GLENN SUMMERS
KENNETH N. BASS
LESLIE M. BERGER
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000

WILLIAM H. EWING
HANGLEY CONNOLLY EPSTEIN
CHICCO FOXMAN & EWING
1429 Walnut Street
14th Floor
Philadelphia, PA 19102
(215) 864-7700

Counsel for Appellees
Yahn & McDonnell, Inc. and
The Pennstar Company

* Counsel of Record

Dated: March 9, 1987

APPENDICES

APPENDIX A

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS LOCAL NO. 115
PENSION PLAN

I. PLAN ASSETS

(A) Statement of assets as of December 31, 1980

	Book value	Market value
Cash	$ 393,063	$ 393,063
Due from investment custodian	183,850	183,850
Accrued interest on marketable securities	9,584	9,584
Government bonds	1,727,166	1,383,906
Corporate bonds	1,868,840	1,310,000
Common stock	5,270,045	5,317,530
Preferred stock	107,490	115,875
Pooled funds	273,397	273,397
Buildings and other depreciable property	23,166	23,166
Less liabilities	3,042	3,042
Total assets	$9,853,559	$9,007,329

(B) Statement of income and disbursements as of December 31, 1980

Income	
Employer contributions	$1,582,806
Withdrawal liability payments	0
Investment income	585,536
Realized gain (loss)	166,584
Unrealized appreciation	339,122
Total	$2,674,048
Disbursements	
Benefit payments	$1,033,915
Expenses	180,245
Total	$1,214,160
Net increase in assets	$1,459,888
Market value of assets as of	
January 1	$7,547,441
December 31	$9,007,329

UNITED RETAIL AND WHOLESALE EMPLOYEES TEAMSTERS LOCAL NO. 115 PENSION PLAN

II. UNFUNDED VESTED BENEFITS LIABILITY AS OF DECEMBER 31, 1980

(A) Vested benefits liability	
(1) Retired participants and beneficiaries receiving payments (498)	$10,263,832
(2) Other participants (705)	9,533,685
(3) Total (1,203)	$19,797,517
(B) Plan assets	$ 9,007,329
(C) Unfunded vested benefits liability (UVB)	$10,790,188

Notes

(1) All calculations are based on the benefit level in effect on December 31, 1980.

(2) The present values shown were calculated in accordance with Interpretations 1 and 2 of the American Academy of Actuaries. The assumed investment rate of return was 6%.

UNITED RETAIL AND WHOLESALE EMPLOYEES TEAMSTERS LOCAL NO. 115 PENSION PLAN

III. DEVELOPMENT OF UNAMORTIZED UNFUNDED VESTED BENEFITS LIABILITY AS OF DECEMBER 31, 1980

	Allocated to:		
	Participating Employers	Withdrawn Employers	Total
A. *Original Liability Components at 12/31/80*			
1. Unfunded vested benefits liability (UVB) at 12/31/79	$11,697,749	$ 0	$11,697,749
2. Allocations to withdrawn employers through 12/31/80	(1,582,354)	1,582,354	0
3. Changes in UVB through 12/31/80	(401,791)	0	(401,791)
4. Reallocated amounts through 12/31/80	164,821	(164,821)	0
5. Total	$ 9,878,425	$1,417,533	$11,295,958

	Allocated to:		
	Participating Employers	Withdrawn Employers	Total
B. *Unamortized Unfunded Vested Benefits Liability (UVB) at 12/31/80*			
1. Prior year UVB remaining unamortized at 12/31/80			
a) Unamortized at 12/31/79	$11,697,749	$ 0	$11,697,749
b) Allocations to employers who withdrew in 1980	(1582,354)	1,582,354	0
c) Amortization during 1980	(505,770)	0	(505,770)
d) Remaining unamortized at 12/31/80	$ 9,609,625	$1,582,354	$11,191,979
2. UVB added at 12/31/80			
a) Change in UVB during 1980	$ (401,791)	$ 0	$ (401,791)
b) Amounts reallocated at 12/31/80	164,821	(164,821)	0
c) Total	$ (236,970)	$ (164,821)	$ (401,791)
3. Unamortized UVB at 12/31/80 = 1 + 2	$ 9,372,655	$1,417,533	$10,790,188

Note

Amounts reallocated at 12/31/80 consist of $9,007 excluded under de minimus rule and $155,814 declared uncollectible from employers withdrawn in 1980.

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS LOCAL 115
PENSION PLAN

IV. EMPLOYER CONTRIBUTION HISTORY

	Employers Still Participating at:	
	12/31/79	12/31/80
1975 Plan Year	$ 789,799.20	N/A
1976 Plan Year	970,576.05	$ 832,560.05
1977 Plan Year	1,120,531.59	968,837.59
1978 Plan Year	1,244,240.01	1,095,454.01
1979 Plan Year	1,460,324.00	1,298,378.00
1980 Plan Year	N/A	1,431,082.00
5 Year Total	$5,585,470.85	$5,626,311.65

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS LOCAL 115
PENSION PLAN

V. FACT SHEET FOR DETERMINING POTENTIAL WITHDRAWAL LIABILITIES FOR EMPLOYERS WITHDRAWING IN 1981

Components of Total Plan Liability (before amortization)

			Total Plan Contributions	
Date Added (Source)		Amount	Plan Years	Amount
12/31/79		$11,697,749	1/1/75 to 12/31/79	$5,585,470.85
12/31/80:	Change in UVB	$ (401,791)	1/1/76 to 12/31/80	$5,626,311.65
	Reallocation	164,821		
		$ (236,970)		

Notes

1) Contributions shown are the total for all employers who had not withdrawn from the plan as of the date the liability component was added.

2) Each component of liability is allocated to participating employers based on the ratio of their contributions during the applicable time period.

3) Once allocated, each liability component is assumed to amortize at the rate of 5% each year from the date the component was added.

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS LOCAL NO. 115
PENSION PLAN

VI. COMPUTATION METHODS APPLICABLE UNDER THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980

In accordance with the decisions made by the Trustees of the Local 115 Pension Plan, the following methods are used in calculating withdrawal liabilities under MEPPA:

(A) Withdrawal Liability Allocation Method

The amount of unfunded vested benefits allocable to a withdrawing employer is determined in accordance with Section 4211(b) of ERISA. This section is referred to as the "Presumptive Method."

(B) De Minimus Rule

The mandatory De Minimus Rule is applicable, as described in Section 4209 of ERISA. The maximum de minimus amount under this section is equal to the lesser of ¾ of 1 percent of the plan's unfunded vested benefits liability and $50,000.

(C) Employer Contribution History

Each withdrawing employer's share of the unfunded vested benefits liability will be determined based on 5 years of contribution history.

(D) Calculation of Withdrawal Payments

(1) The annual payment is calculated based on the withdrawing employer's highest contribution rate and average base units during the 10

plan years preceding withdrawal. For purposes of withdrawals during 1980, only the six plan years starting in 1974 are used. For withdrawals during 1981, seven plan years will be used.

(2) The annual amount due from a withdrawing employer is to be payable on a monthly basis.

UNITED RETAIL AND WHOLESALE EMPLOYEES TEAMSTERS LOCAL NO. 115 PENSION PLAN

VII. ACTUARIAL METHODS AND ASSUMPTIONS

(A) Asset valuation method

For the purpose of determining the unfunded vested benefits liability, assets are valued at market value.

(B) Persons included

Based on data provided to us, all persons entitled to coverage under the plan as of the valuation date are included in the calculations.

(C) Significant actuarial assumptions

(1) Investment return

6% compounded annually, net of investment expenses.

(2) Retirement age

Age 65, age after completion of 10 years of service, or age on the valuation date, whichever is greater.

(3) Mortality

(a) Healthy lives—The 1971 Group Annuity Mortality Table, projected to 1975.

(b) Disabled lives—The 1956 Railroad Retirement Board Disability Annuitants Mortality Table.

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS LOCAL NO. 115
PENSION PLAN

WITHDRAWAL LIABILITY FOR YAHN & MC DONNELL, INC.

Date contribution obligation ceased: November, 1981

A. WITHDRAWAL LIABILITY

Employer's Contributions			Employer's Allocated Liability		
Period	Amount	% of Total	For Plan Years	Original Amount	Unamortized Amount
1975-1979	$235,613.50	4.218%	Through 12/31/79	$493,412	$468,741
1976-1980	260,253.00	4.626%	1/1/80-12/31/80	(10,962)	(10,962)
					$457,779

Total liability = $457,779

B. PAYMENT SCHEDULE

(1) Plan Year Ending	(2) Contribution Rate(s) in Year	(3) Date of Rate Change	(4) Average Rate in Year	(5) Total Contribution	(6) Base Units (Weeks) = (5) ÷ (4)
12/31/74	$12.00/$15.00	4/1/74	$14.250	$35,639.40	2,501*
12/31/75	$15.00/$17.50	4/1/75	16.875	38,367.50	2,274*
12/31/76	$17.50/$20.00	4/1/76	19.375	39,755.00	2,052*
12/31/77	$20.00/$23.00	7/1/77	21.500	42,826.00	1,992
12/31/78	$23.00/$26.00	7/1/78	24.500	47,907.00	1,955
12/31/79	$26.00/$29.00	7/1/79	27.500	66,758.00	2,428
12/31/80	$35.00	1/1/80	35.000	63,007.00	1,800
12/31/81	$39.00	1/1/81	N/A	N/A	N/A

* These 3 years produce highest average base units of 2,276.

Annual payment = $39.00 x 2,276 = $88,764
Monthly payment = $88,764 ÷ 12 = $7,397

Payment duration = 71 months at $7,397 plus a final payment of $851.

Peat, Marwick, Mitchell & Co.
February 25, 1982

APPENDIX B

MEMORANDUM

MARTIN E. SEGAL COMPANY

730 Fifth Avenue • New York, N.Y. 10019
(212) 586-5600

Date April 8, 1981

From Philip B. Polak

To Board of Trustees
M.M. & P. Pension Fund

Re M.M. & P. Pension Fund—
Unfunded Vested Liability

In accordance with your decision at your March Trustees' meeting to use our actuarial assumptions, we have calculated the Unfunded Liability for Vested Benefits *only* for the purpose of calculating Employer withdrawal liability under ERISA.

This figure as of December 31, 1979 is: **$74,365,700.**

When all the data for 1980 is available, we will calculate the change—if any—attributable to the 1980 plan year.

The above figure should not be confused with the unfunded past service liability of your plan which is used to determine the scheduled actuarial cost ($183,696,200).

At this point, we urge that we meet in the near future with Counsel and your Administrator to explore the procedures and substantive matters concerning the determination and collection of any withdrawal liability that can be presented to the Trustees for decision at your scheduled meeting next month.

The agenda for this advisor's meeting could include the following:

1. Notification required to all contributing employers.
2. Information to be provided on request—fees to be charged, if any.
3. Definition of "Withdrawal".
4. Identification of "employer" for withdrawal purposes (companies under "common control").
5. Calculation and collection of an employer's liability.

If any of the Trustees feel that such a meeting is not desirable at this time—or that other parties should be included—please let me or Counsel know as soon as possible.

Best regards.

/bn
cc: Co-Counsel
Fund Administrator

REPLY BRIEF

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

Supreme Court, U.S.
FILED
APR 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

⑩

No. 86-231

PENSION BENEFIT GUARANTY CORPORATION,
Appellant

v.

YAHN & MCDONNELL, INC. and
THE PENNSTAR COMPANY,
Appellees

⑪

No. 86-253

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS UNION LOCAL NO. 115
PENSION PLAN, et al.,
Appellants

v.

YAHN & MCDONNELL, INC., and
THE PENNSTAR COMPANY,
Appellees

On Appeal from the United States Court of Appeals
for the Third Circuit

REPLY BRIEF FOR APPELLANT PENSION PLAN

RICHARD H. MARKOWITZ*
PAULA R. MARKOWITZ
Markowitz & Richman
121 South Broad Street
1100 North American Building
Philadelphia, PA 19107
(215) 875-3100
Counsel of Record

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

5 pp

I. APPELLEES HAVE INCORRECTLY ASSUMED THAT THE TRUSTEES WILL NOT HONOR THEIR FIDUCIARY DUTY

Appellees assume that both employer and employee (or union) trustees necessarily have an interest in maximizing withdrawal liability out of loyalty to the respective parties that appointed them. Appellees state that employer trustees will maximize withdrawal liability "[b]ecause any increase in withdrawal liability will decrease the need for additional contributions from companies that do not withdraw. . . ." Appellees' Brief at 13.[1] Employee or union trustees will maximize the liability to obtain "the maximum amount of money for the benefit of their members. . ." and to punish the withdrawing employer. Appellees' Brief at 14. In *NLRB v. Amax Coal Co.*, 453 U.S. 322, 334, this Court stated that:

> The language and legislative history of §302(c)(5) [29 U.S.C. §186(c)(5)] and ERISA [29 U.S.C. §§1001 *et seq.*] therefore demonstrate that an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him.

Accordingly, it cannot be presumed that a trustee will necessarily act in breach of his fiduciary duty, but it must be assumed that a trustee will act in accordance with that duty.

II. APPELLEES HAVE RELIED ON A NUMBER OF HIGHLY QUESTIONABLE SOURCES

In support of their thesis, appellees have cited a number of highly questionable sources. These include newspaper articles (footnotes 16 and 17 at page 15), a televised news report (footnote 28 at page 21), an argument advanced in the brief of a party in another case (footnote 30 at page 23), and a memorandum of another actuary to another pension fund taken entirely out of context (page 28 and Appendix B at pages 12a-13a). The Pension Plan submits that it is not proper to ask this Court to strike down an Act of Congress on the basis of such questionable authorities.

---

[1] In some situations it could be argued that the interest of a non-withdrawing company would be better served by *decreasing* withdrawal liability to entice the withdrawal and remove a competitor.

III. APPELLEES HAVE ENGAGED IN IMPROPER "SMEAR" TACTICS

Appellees make repeated derogatory references to other entities which are not involved in this case and with which the appellant Pension Plan is in no way connected. See, *e.g.*, page 19 and footnote 25; footnote 21 on page 17. Appellees imply that the appellant Pension Plan is somehow tainted by these derogatory references.

The personal attack on Union Trustee John P. Morris at pages 14-15 of appellees' brief is particularly deplorable. Appellees state that there is no basis for presuming that Mr. Morris can function in an even-handed manner. Appellees cite, *inter alia*, a magazine article entitled, "The Toughest, Meanest Union Boss in Town," the cover story of the Philadelphia Inquirer Magazine, September 4, 1983. Actually the article is not uncomplimentary to Mr. Morris. The subtitle on the cover states that "to working men and women, he's a champion who can't be bought and won't sell out." The article states on page 10 that "John Morris is regarded by the FBI's Philadelphia labor squad as 'Mr. Clean' " and on page 13 that his ascent to power was accomplished "with his 'Mr. Clean' reputation intact." The Pension Plan submits that appellees' own citation demonstrates that the integrity of John P. Morris is beyond reproach — if that has been put in question by appellees' derogatory references to other entities. As to the ability of John P. Morris to fulfill his fiduciary obligations, Mr. Morris is quoted on page 13 of the article as stating that he knows the difference between "right and wrong" and has "always considered what the right thing to do is." He certainly does not sound like a person who will lightly breach his fiduciary duties.

This case has been presented by appellees to two lower courts with dignity and decorum. It is unfortunate that the same cannot be said of the manner in which appellees have thus far presented their case to this Court.

IV. APPELLEES ARE NOT PRECLUDED FROM SHOWING ACTUAL BIAS

The Pension Plan does not argue that a company can never show that an assessment of withdrawal liability has been tainted by bias. Evidence of bias may, of course, be presented to the arbitrator and the reviewing court. Justice O'Connor noted in the conclusion of the concurring opinion in *Connolly v. PBGC*, 106 S.Ct. 1018 (1986):

> Since this case involves only a facial challenge under the Taking Clause to the MPPAA's withdrawal liability provisions, the Court properly refuses to look into the possibility that harsh results such as those I have noted may affect its analysis, let alone a due process inquiry, when the MPPAA is applied in particular cases. 106 S.Ct. at 1032.

Likewise, the instant case involves only a facial challenge. The Court should properly refuse to speculate about the effect of possible bias in other situations, since there is not one iota of evidence on the record of this case that the assessment of withdrawal liability against the appellees was, in any way, motivated by, or affected by, personal bias or animosity.

V. CONCLUSION

For all the reasons set forth above and in the prior briefs of the Pension Plan and of the PBGC, the judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD H. MARKOWITZ*
PAULA R. MARKOWITZ
Markowitz & Richman
121 South Broad Street
1100 North American Building
Philadelphia, PA 19107
(215) 875-3100

**Counsel of Record*

REPLY BRIEF

11

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No. 86-231

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,
v.
YAHN & MCDONNELL, INC. and
THE PENNSTAR COMPANY, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR THE APPELLANT

GARY M. FORD *
General Counsel
CAROL CONNOR FLOWE
Special Counsel
PETER H. GOULD
Deputy Assistant General Counsel
Pension Benefit Guaranty Corporation
Office of the General Counsel
2020 K Street, N.W.
Washington, D.C. 20006
(202) 778-8820

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

No. 86-231

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,
v.
YAHN & MCDONNELL, INC. and
THE PENNSTAR COMPANY, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR THE APPELLANT

IN AN EFFORT TO CHARACTERIZE THE TRUSTEES AS ADJUDICATIVE DECISIONMAKERS, APPELLEES MISSTATE THE ROLE OF THE TRUSTEES IN DETERMINING THE LIABILITY OF AN EMPLOYER FOR WITHDRAWAL FROM A MULTIEMPLOYER PENSION PLAN

Appellees contend that the trustees of multiemployer pension plans are "decisionmakers" within the meaning of the Court's "biased decisionmaker" cases. This is plainly erroneous. As stated in *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, Inc.*:

> Rather than serving as judicial decisionmakers, the trustees are simply part of an administrative procedure set up by Congress for reaching an initial determination of withdrawal liability which is then challengeable in arbitration and in court.

762 F.2d 1137, 1140 (1st Cir. 1985) ("*Keith Fulton*"). Indeed, the function of plan trustees in assessing withdrawal liability under MPPAA is no different from the role of the government administrators at issue in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) ("*Jerrico*"). There, the administrators, in formulating civil penalty claims for violations of the child labor laws, considered such general factors as the employer's history of prior violations; any evidence of willfulness or failure to take reasonable precautions to avoid violations; the occupations in which minors were employed; the exposure of minors to hazards; and the duration of the illegal employment. *Id.* at 240 n.1. Nevertheless, the Court found that the administrators were not "decisionmakers."

Like the administrators in *Jerrico*, multiemployer plan trustees are "not judge[s];" they perform "no judicial or quasi-judicial functions;" they "hear no witnesses;" and they "rule on no disputed factual or legal questions." 446 U.S. at 247. Instead, they simply make a determination and issue a demand for payment which is like a civil complaint or administrative charge. Consequently, plan trustees "simply cannot be equated with the kind of decisionmakers to which the principles of *Tumey* and *Ward* have been held applicable." *Id.*

In an effort to overcome this fact, Appellees repeatedly blur the distinction between the roles of the trustees, the plan's enrolled actuary, and the arbitrator. They incorrectly assert that "[n]othing in the statute . . . makes the [plan's enrolled] actuary anything other than . . . the agent of his client." (Br. at 29.) Therefore, they argue, it is the pension plans, not their actuaries, that "establish actuarial methods and assumptions." (Br. at 31.) Moreover, Appellees greatly exaggerate the discretion granted trustees in performing the administrative task of issuing individual withdrawal liability bills. The statute itself directly and succinctly refutes each of Appellees' efforts to transform trustees into adjudicative decisionmakers.

The statutory scheme includes five basic steps, the first of which is the calculation of a plan's "unfunded vested benefits." Benefits in a plan vest after a participant completes a specified period of service. 29 U.S.C. § 1053. A plan's "vested benefits" include amounts payable in the future to participants who have not yet retired, as well as amounts currently being paid to retirees or their beneficiaries.

The plan's enrolled actuary determines the present value of a plan's liability for vested benefits in an actuarial valuation performed at least triennially, and in many plans annually. *See* 29 U.S.C. § 1393(b)(1); 29 U.S.C. § 1082(c)(9). The actuarial valuation is a snapshot, as of a given date, of the present value of the plan's liability for those benefits.

To arrive at the present value of a plan's liability for vested benefits, the actuary must employ certain assumptions and methods. 29 U.S.C. § 1393(a). In general, after arriving at a total value of all vested benefits then earned by all participants, the actuary must discount that value by using certain assumptions. The actuary knows, for example, that some participants will die before receiving all or a portion of their benefits. Accordingly, the actuary uses a mortality rate assumption to discount the total value to reflect this contingency. Similarly, the actuary knows that some vested benefits will be covered by earnings on assets the plan is expected to accumulate for decades in the future. Consequently, the actuary uses actuarial interest rate assumptions to discount the liability for estimated future investment earnings over the period—often 40 years or longer—during which the vested benefits will be paid. By law, the actuary's assumptions and methods must (1) be reasonable in the aggregate, and (2) offer the actuary's "best estimate" of anticipated experience under the plan. 29 U.S.C. § 1393(a).

After calculating the present value of the plan's vested benefits, the actuary deducts the value of the plan's current assets to determine the amount of the plan's unfunded vested benefits. 29 U.S.C. § 1391. The actuary's valuation is then presented to the trustees of the plan, and the withdrawal liability valuation work of the actuary for that plan year is completed.

The second step in the process is the allocation of the unfunded vested benefits among the employers participating in the plan. The trustees are responsible for allocating the unfunded vested benefits pursuant to one of four statutory allocation methods, or a method approved by the PBGC. 29 U.S.C. § 1391. By law, the trustees must select an allocation method before the withdrawal of any employer to which the method is applied. *Id.* Likewise, all allocation methods are based on actuarial valuations performed for plan years preceding the employer's withdrawal. *Id.* Finally, the allocation method must "operate and be applied uniformly with respect to each employer." 29 U.S.C. § 1394(b).

In the third step of the process the trustees determine whether an employer has "withdrawn." *See* 29 U.S.C. §§ 1383, 1385. Then, after considering on the basis of facts available whether any of the "forgiveness provisions" of the statute apply, *see, e.g.*, 29 U.S.C. § 1405, the trustees issue a notice and demand for withdrawal liability. 29 U.S.C. § 1399(b)(1).

The fourth step is mandatory conciliation. *See* 29 U.S.C. §§ 1399(b)(2), 1401(a)(1). If the employer disputes the trustees' determination, it is entitled to request review of "any specific matter" relating to the determination, "identify any inaccuracy" in the withdrawal liability assessment, or "furnish any additional relevant information" to the plan. 29 U.S.C. § 1399(b)(2)(A). The plan must give the employer a response to the request for review. 29 U.S.C. § 1399(b)(2)(B).

This informal review of the trustees' determination serves to "clarify and perhaps pare down the issues," *Grand Union Company v. Food Employers Labor Relations Ass'n*, 808 F.2d 66, 70 (D.C. Cir. 1987), and therefore encourages resolution of the dispute without litigation. If the dispute is not resolved, however, the employer is entitled to a full evidentiary hearing before a neutral arbitrator. 29 U.S.C. § 1401(a)(1).

The fifth step in the process is arbitration, and the hearing before the arbitrator is the first occasion on which a record is made. Indeed, there is nothing to prohibit the employer from raising issues or introducing evidence in the arbitration not previously identified in the request for review. *Cf.* 29 C.F.R. § 2641.2(d). A full range of pre-hearing discovery is available to the parties, including depositions, interrogatories, and requests for production of documents, 29 C.F.R. § 2641.4(a)(2), (4); the parties are entitled to a hearing during which both testimonial and documentary evidence may be presented and witnesses may be cross-examined, 29 C.F.R. § 2641.5; post-hearing briefs may be submitted by the parties in support of their respective positions, 29 C.F.R. § 2641.5(g); and, following the close of the hearing and the submission of briefs, the arbitrator issues a "written award," which must include findings of fact and conclusions of law. 29 C.F.R. § 2641.7(a)(1).

Because there is a presumption in the arbitration favoring the plan's factual determinations, the plan does not have to prove affirmatively in every case the reasonableness of every actuarial assumption, the accuracy of every underlying fact, and the inapplicability of every forgiveness provision in the statute. Instead, the employer must identify those aspects of the withdrawal liability determination with which it disagrees and come forward with a substantial challenge. The plan must then meet that challenge. This procedure saves the plan from presenting in case after case what may be many days of testimony and volumes of documentary evidence on issues not in serious dispute. *See, e.g., UMW 1974 Pension Plan v. Williamson Shaft Contracting Co.*, 6 Empl. Ben. Cas. (BNA) 1593 (1985) (Pritzker, Arb.) (plan presentation of limited rebuttal to nominal actuarial challenge).

Plainly, under this statutory scheme, it is the arbitrator, not the trustees, who adjudicates withdrawal liability disputes. Ignoring this fact, Appellees argue that trustees are adjudicative decisionmakers because they exercise "tremendous discretion" in the selection of actuarial assumptions and in the application of statutory "exemptions." They do neither. Accordingly, Appellees' argument fails.[1]

Congress' designation of enrolled actuaries to select a plan's actuarial assumptions does not make the trustees decisionmakers. Rather, the designation of enrolled actuaries to perform this task limits the trustees' discretion to merely approving the recommendations of the actuaries. This was a considered and deliberate choice, based on years of congressional experience with the actuarial profession.

When Congress enacted ERISA, it required actuarial valuations for ongoing funding of both corporate and multiemployer pension plans. *See generally* 29 U.S.C.

§ 1082.[2] At the same time, Congress established a comprehensive regulatory scheme to govern the activities of the actuaries who performed the valuations. *See* 29 U.S.C. §§ 1241-1242. Among other things, they were required to be "enrolled" in order to perform actuarial services with respect to plans covered by ERISA. 29 U.S.C. § 1242(a). Then, in 1980, after six years of experience with the use of enrolled actuaries to perform funding valuations, Congress turned again to the actuarial profession to perform valuations for withdrawal liability purposes. 29 U.S.C. § 1393.

Appellees note that the withdrawal liability task of an actuary is complex and sensitive. They are correct. This is precisely the reason Congress designated enrolled actuaries to perform this task. Given their demonstrated performance over six years, the choice was more than reasonable. And, requiring plan trustees to follow their recommendations was equally reasonable.

Appellees argue, however, that a plan's actuary may be improperly influenced by the trustees of the plan, or that the trustees may reject the actuary's assumptions and employ their own. This argument is demonstrably without merit. The actuarial assumptions used by a plan must be the *actuary's* "best estimate." 29 U.S.C. § 1393 (a)(1). If they are not, the assumptions will be rejected by the arbitrator. *See, e.g., Casablanca Indus., Inc. v. UFCW Local 23-Giant Eagle Pension Fund*, 7 Empl. Ben. Cas. (BNA) 2705, 2723-24 (1986) (Jaffe, Arb.). *See also Woodward Sand Co. v. Operating Engineers Pension Trust*, 3 Empl. Ben. Cas. (BNA) 2351

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[1] Significantly, neither Appellees nor their *amici* attempt to defend the Third Circuit's conclusion that the trustees' choice of an allocation method makes the trustees adjudicative decisionmakers.

[2] These funding valuations directly affect the level of employer tax deductions for contributions to a pension plan. In 1984, these pension deductions represented an annual aggregate tax expenditure of approximately $50.5 billion. *See* Executive Office of the President, *Office of Management and Budget, Special Analyses: Budget of the U.S. Government FY 1985* at G-47, Table G-2 (1984).

(1982) (Kaufman, Arb.). Moreover, if the actuary allows himself to be subjected to improper influence, his enrollment can be suspended or terminated. 29 U.S.C. § 1242(b).[3]

The trustees' limited role in approving assumptions selected by an enrolled actuary clearly does not make them adjudicative decisionmakers. Accordingly, Appellees' argument is without merit.

Similarly, the trustees' application of the so-called "exemptions" or "forgiveness provisions" does not make them adjudicative decisionmakers. The exemptions and forgiveness provisions are set out in great detail in the statute, *see, e.g.*, 29 U.S.C. §§ 1384, 1398, 1405(a), 1405(d), and have been further elaborated upon in the decisions of arbitrators and in PBGC regulations and advisory opinions.[4] In applying the provisions, trustees "hear no witnesses" and "rule on no disputed factual or legal questions." *Jerrico*, 446 U.S. at 247. Instead, after reviewing the facts pertinent to the application of these provisions, they make no more than an administrative determination to issue a withdrawal liability assessment and demand. Thus, like the administrators in *Jerrico*, the trustees simply are not the kind of decisionmakers to whom a procedural due process analysis is applicable.

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[3] Not surprisingly, there is no evidence in this record that the actuary for the Appellant Pension Plan was in any way influenced by the Plan's trustees.

[4] *See, e.g.*, *Herman Segall, Inc. v. ILGWU Retirement Fund*, 3 Empl. Ben. Cas. (BNA) 2449 (1982) (Pillsbury, Arb.) (interpreting 29 U.S.C. § 1405); 29 C.F.R. Pt. 2643 (expanding on 29 U.S.C. § 1384); PBGC Opinion Letter 82-33 (clarifying definition of "facility" under 29 U.S.C. § 1397).

THERE IS NO BASIS IN LAW OR FACT FOR APPELLEES' CONTENTION THAT THE TRUSTEES SUFFER A DISQUALIFYING BIAS

Even if the withdrawal liability determinations of multiemployer plan trustees were adjudicative, those determinations would satisfy due process standards because the trustees are unbiased. Citing *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) ("*Amax Coal*"), Appellees argue, to the contrary, that the trustees' fiduciary duties require, as a matter of law, that they maximize withdrawal liability. This conclusion does not withstand scrutiny.

No one would dispute that trustees have a fiduciary duty to *collect* claims for both delinquent contributions and withdrawal liability, provided the cost of collection does not exceed the likely recovery. It is quite another thing, however, to assert, as Appellees do, that trustees have a fiduciary duty to maximize the *amount* of withdrawal liability claims. Indeed, that assertion ignores the trustees' equally significant interest in encouraging new entrants into the plan.[5]

To bolster their argument to the contrary, Appellees rely on a partial quote from a passage of legislative history. The full passage is as follows:

> We do not intend to restrict plan sponsors' prudent exercise of judgment in administering the withdrawal liability provisions generally. It is expected that plan trustees will need to make practical collection decisions which are consistent with their fiduciary duties and characteristic of any responsible creditor concerned with maximizing the total ultimate recovery at supportable costs. *Thus, for example, where it is prudent and in the participants'*

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[5] *See, e.g.*, Power, *The Best-Laid Plans*, Forbes, Jan. 28, 1985, at 86 (reporting one large plan's effort to "wipe out the trust's unfunded liability, [to] help employers to join the plan and prevent further litigation from those trying to get out").

> *interest, plan trustees may decide to settle a withdrawal liability dispute for less than the full amount claimed, to cooperate with an employer's other creditors in a contractual or court-supervised renegotiation of the employer's indebtedness, or even to forego the assessment or further collection of liability where it is apparent from the circumstances that the costs involved would exceed the amount likely to be recovered.*

126 Cong. Rec. S23288 (daily ed. Aug. 26, 1980) (statement of Senators Williams and Javits) (emphasis added). It is clear from the full passage that Congress was addressing the collection of withdrawal liability, not its calculation, and that even there Congress required trustees to strike a reasonable balance. *See also* Prohibited Transaction Exemption 76-1, 41 Fed. Reg. 12740 (1976) (multiemployer plan may compromise claim for delinquent contributions where circumstances demonstrate, *inter alia*, that the costs of collection may exceed the amount of the recovery).

In short, Appellees misunderstand the scope of the trustees' fiduciary duties. Those duties do *not* require a single-minded focus on "extracting as much money as possible from withdrawing employers," but instead require the trustees to balance a number of competing factors, militating both for and against large assessments of withdrawal liability. Equally important, in doing so, the trustees have a fiduciary obligation to discharge their duties in accordance with the "comprehensive and reticulated" provisions of Title IV of ERISA. *See Nachman Corp. v. PBGC*, 446 U.S. 359, 362 (1980). Appellees' contention that the trustees' fiduciary duties make them biased as a matter of law is, therefore, simply incorrect.

Appellees also argue that the trustees are biased as a matter of fact, but this contention is equally incorrect. The asserted basis for this argument is that employer trustees represent employers, union trustees represent unions, and both the employers and unions have interests adverse to withdrawing employers. As Appellees themselves note, however, this Court held in *Amax Coal* that the trustees bear an unwavering duty to the beneficiaries of the trust, "to the exclusion of the interests of all other parties." (Br. at 10, *quoting* 453 U.S. at 329-30.) Thus, the asserted authority for Appellees' "biased as a matter of law" argument directly refutes their "biased as a matter of fact" argument.

Moreover, Appellees' argument that multiemployer trustees are biased as a matter of fact is simply irrelevant to a facial constitutional challenge. This is especially true where, as here, there is absolutely no evidence in the record to indicate that the Appellant Trustees suffer from any of the bias alleged by Appellees.

Recognizing this, Appellees resort to innuendo and hearsay about alleged abuses in a small number of other pension funds. (Br. at 14-21.) However, assertions that some trustees of some plans may have abused their position at some time in the past hardly warrants the conclusion that the trustees of more than 2000 multiemployer pension plans in the United States suffer from a systemic disqualifying bias. That Appellees devote much of their brief to this diversion only underscores the weakness of their case.

Appellees' "facts" about alleged abuse of pension funds are, in any event, legislative facts within the purview of Congress. Indeed, as Appellees note, Congress was extensively involved in investigations of the alleged misuse of the Central States Pension Fund during 1976 through 1982 *—the very same time period during which MPPAA was enacted. Moreover, Congress heard testimony from numerous employers and employer organizations—including trade associations representing employers such as Appellees—yet did not conclude that multiemployer plan trustees suffered from disqualifying corruption. Plainly, Congress concluded that trustees could accord fair and unbiased treatment to withdrawing employers. Appellees' request that this Court second-guess Congress' judgment on this matter should, therefore, be rejected.

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* Br. at 19 n.25. Appellees rely heavily on the alleged corruption in the Central States Pension Fund, yet seem to acknowledge that the corruption in that fund has now been eliminated. Br. at 20. *See generally* 132 Cong. Rec. S8384 (daily ed. June 24, 1986) (statement of Sen. Kennedy).

THE PRESUMPTIONS ACCORDED WITHDRAWAL LIABILITY DETERMINATIONS MERELY ESTABLISH THE ORDER AND WEIGHT OF EVIDENCE IN THE ARBITRATION

Fundamentally, this case involves nothing more than an attack on the authority of Congress to establish the order and weight of proof in an evidentiary proceeding created by Congress to adjudicate a liability created by Congress. Of course, both Congress and the courts may, and routinely do, establish the order and weight of proof in civil judicial proceedings, where the litigants are manifestly "biased" in their own favor. Thus, even if the trustees are viewed as "biased," there is no constitutional infirmity to the provisions of 29 U.S.C. § 1401 (a)(3).

On its *face*, 29 U.S.C. § 1401(a)(3) establishes two presumptions, and it is now well settled that Congress is not constrained by the Constitution from enacting reasonable presumptions. *See, e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *Mathews v. Lucas*, 427 U.S. 495 (1976); *United States v. Gainey*, 380 U.S. 63 (1965). This is equally true where, as here, the presumption "has the weight of affirmative evidence." *See, e.g., Dick v. New York Life Ins. Co.*, 359 U.S. 437, 442 (1959).

Moreover, the withdrawal liability presumptions do not operate like traditional presumptions at all. Instead,

they merely delineate a burden of proof. As Appellees concede (Br. at 34-5), where Congress has enacted a true presumption, once a party proves fact "A", fact "B" is presumed to be true. *See, e.g., Mathews v. Lucas*, 427 U.S. 495 (1976) (upon proof of specified facts, child is presumed to have been a dependent of deceased parent). In contrast, what is "presumed" here is that the trustees' determination is correct. Thus, the trustees' notice and demand of withdrawal liability in effect sets forth a prima facie case, and the burden then shifts to the withdrawing employer to establish, by a preponderance of the evidence, that it is incorrect.

The Court has recognized that a statutory provision may be stated as a rebuttable presumption, but in fact be nothing more than an allocation of the burden of persuasion to a particular party. *See, e.g., Lavine v. Milne*, 424 U.S. 577, 584 (1976). Moreover, the Court has stated that "[o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Id.* at 585.[7] Thus, even where that burden is great, the Court has declined to take issue with the wisdom of a legislative determination regarding its allocation. *Id.* at 587. Nothing in this case requires a different result.

The Third Circuit erroneously concluded otherwise because it believed that the arbitrator merely reviews the trustees' determination in the fashion of an appellate tribunal. (J.S. at 27a-28a).[8] This error may have resulted from Congress' use in one of the presumptions of the phrase "unreasonable or clearly erroneous," 29 U.S.C. § 1401(a)(3)(A), which is more commonly seen in an appellate setting. *See, e.g.*, Fed. R. Civ. P. 52(a). Clearly, however, the withdrawal liability arbitration is not an appellate proceeding but a plenary one, where the first record is made, and where the arbitrator may consider facts and issues not previously raised between the parties.

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[7] Although the Court's decision in *Santosky v. Kramer*, 455 U.S. 745 (1982), applies the due process test enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to a burden of proof, *Santosky* addresses only the *standard* of proof, not the *locus* of the burden. As discussed *infra*, the *standard* of proof in 29 U.S.C. § 1401 (a)(3)(A), even if greater than a mere preponderance of the evidence, clearly satisfies the *Mathews v. Eldridge* test.

[8] The court's conclusion was based on its earlier decision in *Goodman v. Laborers' Internat'l Union*, 742 F.2d 780 (3d Cir.

Appellees nevertheless argue that the standard of proof in 29 U.S.C. § 1401(a)(3)(A) effectively insulates withdrawal liability determinations from review. Even assuming, however, that the standard of proof here requires an employer to prove its case by more than a bare preponderance of the evidence—and PBGC does not believe that it does[9]—it amply meets the procedural due process

test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See, e.g., Keith Fulton*, 762 F.2d at 1140-46; *Republic Industries, Inc. v. Teamsters Joint Council No. 83 Pension Fund*, 718 F.2d 628, 639-42 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

Moreover, as Appellees concede, elimination of the presumptions would replace an efficient system of adjudication with an inefficient one. (Br. at 37.) And, it would defeat the important congressional goals of deterring frivolous litigation, encouraging uniform treatment of similarly situated employers, and husbanding the scarce resources of multiemployer pension plans. Due process does not require this much.

CONCLUSION

As the Court stated in *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), "due process is flexible and calls for such procedural protections as the particular situation demands." The withdrawal liability procedures adopted by Congress meet this standard. Indeed, the procedures are a laudable effort to take "a large volume of private conflicts out of the courts and into the channels of arbitration, mediation and conciliation." Burger, *Using Arbitration to Achieve Justice*, Arb. J., Dec. 1985, at 3, 5.

Respectfully submitted,

GARY M. FORD *
General Counsel

CAROL CONNOR FLOWE
Special Counsel

PETER H. GOULD
Deputy Assistant General Counsel

Pension Benefit Guaranty Corporation
Office of the General Counsel
2020 K Street, N.W.
Washington, D.C. 20006
(202) 778-8820

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* Counsel of Record

1984). In *Goodman*, however, the trial board that was found to be biased had conducted an evidentiary proceeding, unlike the trustees here, who simply make an administrative determination. And, the hearings panel in *Goodman*, which was responsible for reviewing the decision of the trial board, was not required to conduct a plenary proceeding. Indeed, the hearings panel incorporated the record before the trial board into its record, and merely "conducted a review process rather than an independent determination of the facts." *Id.* at 785. This was "an appeal rather than a retrial," and "[t]here were no specific findings as to any of the particular charges." *Id.*

[9] The juxtaposition of the phrase "unreasonable or clearly erroneous" with the phrase "preponderance of the evidence" does give rise to ambiguity. However, comparing the language in 29 U.S.C. § 1401(a)(3)(A) with the language in 29 U.S.C. § 1401(c) (decision of arbitrator to be presumed correct unless rebutted by a *clear* preponderance of the evidence), PBGC believes that Congress intended to impose a mere preponderance of the evidence standard. *Amicus* Flying Tiger Line, Inc. disputes this interpretation, citing this Court's decision in *Anderson v. City of Bessemer*, 470 U.S. 564 (1985) (interpreting "clearly erroneous" standard in Fed. R. Civ. P. 52(a)). *Anderson*, however, clearly involved the standard of review for an appellate court, which merely reviews the record made before a trial court. It has no applicability to the facts here, where the arbitrator makes a decision based on a record created for the first time in the arbitration.

AMICUS CURIAE

BRIEF

No. 86-231

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GERALD E COLE, JR.
General Counsel

ISRAEL GOLDOWITZ*
Deputy General Counsel

ANDRÉE M. ST. MARTIN
Senior Associate Counsel

THOMAS S. GIGOT
Senior Associate Counsel

EDWARD J. GILMARTIN
Associate Counsel

UMWA Health & Retirement Funds
Office of General Counsel
2021 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 452-5034

Counsel for Amici Curiae *the Trustees of the UMWA 1950 and 1974 Pension Plans*

Dated: January 30, 1987

*Counsel of Record

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GERALD E COLE, JR.
General Counsel

ISRAEL GOLDOWITZ*
Deputy General Counsel

ANDRÉE M. ST. MARTIN
Senior Associate Counsel

THOMAS S. GIGOT
Senior Associate Counsel

EDWARD J. GILMARTIN
Associate Counsel

UMWA Health & Retirement Funds
Office of General Counsel
2021 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 452-5034

Counsel for Amici Curiae *the Trustees of the UMWA 1950 and 1974 Pension Plans*

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**Counsel of Record*

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No. 86-231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

YAHN & McDONNELL, INC., *et al.,*
Appellees.

On Appeal from the
United States Court of Appeals
for the Third Circuit

BRIEF OF THE TRUSTEES OF THE
UNITED MINE WORKERS OF AMERICA 1950 AND 1974
PENSION PLANS AS AMICI CURIAE IN
SUPPORT OF APPELLANT

INTEREST OF THE AMICI CURIAE

Amici are the Trustees of the United Mine Workers of America ("UMWA") 1950 and 1974 Pension Plans (the "1950 Plan" and "1974 Plan," or collectively, "the Plans"), two multiemployer pension plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), *as amended by* the Multi-employer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1001-1461 (1982 & Supp. III 1985). The Plans are maintained under collective bargaining agreements between the UMWA and employers in the bituminous coal industry, and are a continuation of one of the nation's first collectively-bargained multiemployer plans. That plan came into existence in 1946 through negotiations between the UMWA and the federal government, which had seized the nation's coal mines under emergency powers. For most of its existence, that plan was known as the UMWA Welfare and Retirement Fund of 1950 ("1950 Fund").

The Plans are among the nation's largest multiemployer pension plans. Together they hold assets valued at over $4.3 billion. In their fiscal year ending on June 30, 1986, the Plans paid over $400 million in benefits to over 125,000 beneficiaries. In that same year, the Plans received over $510 million in contributions from over 1,500 participating employers.

The Plans' obligations to pay vested pension benefits are substantial. The present value of their liabilities for vested benefits exceeds $4.8 billion. Thus, with over $4.3 billion in assets, the two Plans have almost $500 million in unfunded vested benefits.[1]

Historically, the Plans have experienced severe financial difficulties, caused in part by the vicissitudes of the bituminous coal industry. At their inception in 1974, the Plans had past service liabilities of $3.3 billion, which had been incurred under the pension program of the predecessor 1950 Fund. In 1976 and 1977, precipitous declines in employer contributions required the Plans' settlors to reallocate future contribution income to the Plans from one of their sister welfare benefit plans. In 1978, the 1950 Plan was unable to pay benefits for several months because a 111-day coal strike temporarily halted employer contributions. The 1950 Plan subsequently secured a bank loan to make up the missed pension payments. During the five years preceding MPPAA's enactment, the 1950 Plan was on the average only 3% funded and the 1974 Plan was only 19% funded. Congress was well aware of the Plans' tenuous financial condition, and it afforded the Plans additional relief in MPPAA. Among other things, Congress adopted Section 4211(d)(2) of ERISA, which exempts the Plans from MPPAA's "de minimis" rule, 20 year withdrawal liability payment "cap," and certain other liability-mitigating provisions of the Act. 29 U.S.C. § 1391(d)(2).[2]

Despite MPPAA's goal of curtailing employer withdrawals, *see* H.R. Rep. No. 869, Pt. II, 96th Cong., 2d Sess. 15, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2918, 2935; *Connolly v. PBGC*, ____ U.S. ____, 106 S.Ct. 1018, 1021-22 (1986), the Plans' contributing employer base has declined from 2,300 to fewer than 1,600 employers since MPPAA's enactment. Those withdrawing employers' share of the Plans' underfunding, assessed as withdrawal liability claims, totals $165 million, which would otherwise have been borne by the employers remaining in the Plans.

The Plans have not succeeded in collecting all of that $165 million. Although their withdrawal liability collection program is one of the most vigorous and successful among multiemployer plans, the Plans have recovered only $23.8 million in withdrawal liability.[3]

The cost of recovering that amount, especially in cases contested under MPPAA's arbitration scheme, has been considerable. The Plans' legal fees for a typical arbitration matter are in the range of $20,000 to $50,000. One single arbitration case involving these Plans consumed sixteen days of hearing and generated 3,125 pages of hearing transcript.[4]

These costs would undoubtedly be higher had Congress not designed the relatively efficient mechanism of mandatory arbitration for resolving withdrawal liability disputes. MPPAA's arbitration scheme affords plan withdrawal liability determinations a presumption of correctness. 29 U.S.C. § 1401(a)(3)(A), (B). As we show in the Argument portion of this brief, the presumption does not insulate the Plans' withdrawal liability determinations from review. Rather, it simply relieves the Plans from having to prove every element of their claim for withdrawal liability before the employer puts on its case. The employer contesting the withdrawal liability claim must identify the specific elements of the Plans' determination with which it disagrees, 29 U.S.C. § 1399(b)(2)(A), and it then bears the burden of proof in arbitration. 29 U.S.C. § 1401(a)(3)(A), (B).

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[1] "Unfunded vested benefits" is the actuarial present value of vested benefits minus the value of plan assets. 29 U.S.C. § 1393(c).

[2] The Plans are plans described in Section 404(c) of the Internal Revenue Code. *See* Treas. Reg. § 1.404(c)-1(b) (1960).

[3] A 1985 survey revealed that of a total $186.7 million in withdrawal liability assessed by a sample of 91 multiemployer plans, only $32.8 million was found collectible. GAO, *Report to the Congress, Effects of Liabilities Assessed Employers Withdrawing from Multiemployer Pension Plans* ii (1985) (hereinafter 'GAO Liabilities Report').

[4] In addition, there are fees of the arbitrator, the American Arbitration Association, the court reporter, and, in many cases, those of actuaries or other expert witnesses.

Were this burden shifted, and the Plans required to prove every element of their withdrawal liability claim before the employer is put to its proof, the Plans' collection costs would be prohibitive. Indeed, this was Congress' chief concern in drafting MPPAA's arbitration provisions. Congress stated: "These [presumptions] are necessary in order to ensure the enforceability of employer liability. In the absence of these presumptions employers could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination." H.R. Rep. No. 869, Pt. I, 96th Cong., 2d Sess. 86, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2918, 2954; *see also* Sen. Comm. on Labor and Human Resources, 96th Cong., 2d Session, S. 1076: The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 20-21 (Comm. Print 1980) (hereinafter "*Senate Labor Summary*"). It was equally apparent to Congress that it is technically impossible for a plan to prove the "correctness" of its actuarial determinations and methods, "matters with respect to which there are often several equally correct approaches." *Senate Labor Summary* at 20-21. Disputes over which is the "more correct" of several equally correct actuarial determinations could only lead to "[l]engthy, futile and costly bickering over the [actuarial] methods chosen." *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund*, 762 F.2d 1137, 1143 (1st Cir. 1985) (*en banc*) (quoting from *Dorn's Transp., Inc. v. IAM Nat. Pension Fund*, 578 F.Supp. 1222, 1239 (D.D.C. 1984), aff'd, 753 F.2d 166 (D.C. Cir. 1985)).

Nevertheless, in this case, the United States Court of Appeals for the Third Circuit decided that MPPAA's arbitration presumptions deprive a withdrawn employer of procedural due process, and therefore struck the presumptions from MPPAA (J.S. App. A 28-33a) This decision effectively forces plans to prove each element involved in their withdrawal liability determinations, including those actuarial matters to which there can be no single correct approach, before the employer is required to put on a case. So armed, withdrawn employers can easily inflate plans' collection costs beyond the value of the plans' possible recovery, simply by demanding arbitration, thereby forcing plans to abandon all but their

largest claims.[5] Indeed, disputes may be created "even in cases where the [withdrawal liability] amount apparently is correct but the employer hopes it can slip a marginal case for another amount past a sympathetic arbitrator." *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Industry Pension Fund*, 762 F.2d at 1144-45. Further, without the presumptions, arbitration results are likely to vary for withdrawals from the same plans in the same plan year, as different arbitrators are swayed by the actuarial arguments of paid expert witnesses. *See id.* In short, these Plans have a vital interest in the reversal of the Third Circuit's decision.

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[5] Attorneys' and expert witness' fees are generally not recoverable in MPPAA arbitrations. *See* 29 C.F.R. § 2641.9 (1986).

STATUTORY BACKGROUND

In 1974, Congress enacted ERISA to ensure that employees and their beneficiaries would not be deprived of promised retirement benefits. *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984). To achieve this goal, Congress created the Pension Benefit Guaranty Corporation ("PBGC") to administer an insurance program for participants in both single-employer and multiemployer pension plans. *Connolly v. PBGC*, 475 U.S. at ____, 106 S.Ct. at 1020. Thus, if a covered pension plan terminated with assets insufficient to pay vested benefits, ERISA required the PBGC to pay benefits. *Id.; see* 29 U.S.C. §§ 1322, 1361.

PBGC's insurance coverage for single-employer plans commenced immediately, but mandatory insurance coverage for multiemployer plans was postponed because Congress viewed the threat of numerous multiemployer pension plan terminations as an unacceptable risk for the PBGC insurance program. *PBGC v. R.A. Gray & Co.*, 467 U.S. at 720-21. Indeed, the PBGC advised Congress in 1978 that the then-existing statutory scheme encouraged employers to withdraw from already weak multiemployer plans, thereby exacerbating the potential insurance risk to the PBGC. *Id.* at 722-24; *Connolly v. PBGC*, 475 U.S. at ____, 106 S.Ct. at 1021.

To strengthen multiemployer plans and discourage employer withdrawals, Congress enacted MPPAA in 1980. MPPAA requires an employer withdrawing from a multiemployer plan to pay "a fixed and certain debt" to the plan representing that employer's share of the plan's unfunded vested liabilities. *Connolly v. PBGC*, 475 U.S. at ____, 106 S.Ct. at 1022. "This withdrawal liability is the employer's proportionate share of the plan's unfunded vested benefits, calculated as the difference between the present value of vested benefits and the current value of the plan's assets." *Id.* (quoting *PBGC v. R.A. Gray & Co.*, 467 U.S. at 725.)

The employer's share of unfunded vested benefits is determined under one of four alternative allocation methods set forth at 29 U.S.C. § 1391, or under an alternate method approved by the PBGC. *Id.*[6] In general, the plan sponsor, its joint board of trustees, 29 U.S.C. § 1301(a)(10)(A), must initially select one of these four methods, and then apply that method uniformly to all withdrawing employers on a prospective basis. *See* 29 U.S.C. § 1394(b).[7] The valuation of the plan's vested benefits, in turn, must be made by the plan's enrolled actuary. *See* 29 U.S.C. § 1393. An enrolled actuary is a professional consultant to the plan and is subject to government regulations and professional standards. 29 U.S.C. §§ 1241-1242; 26 U.S.C. § 7701(a)(3) (1982 & Supp. III 1985); *see* 20 C.F.R. §§ 901.1-901.71. His valuation must be based on actuarial assumptions (about such things as employee life expectancy and future rates of return on available plan assets) and methods which either: (1) follow regulations which the PBGC adopts, or (2) "in the aggregate, are reasonable" and "in combination, offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a).[8]

The PBGC has not to date issued regulations concerning appropriate actuarial assumptions and methods. MPPAA's "reasonable in the aggregate" standard, however, has a well settled meaning in the actuarial profession and in law. This standard is virtually identical to that contained in Section 302 of ERISA and Section 412 of the Internal Revenue Code of 1954, which govern the use of actuarial assumptions for purposes of pension plan funding. *Compare* 29 U.S.C. § 1082(c)(3)

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[6] By statute, coal industry plans are required to use the so-called "rolling five" allocation method set forth at 29 U.S.C. § 1391(c)(3), unless another method is adopted by plan amendment. *See* 29 U.S.C. § 1391(d)(1). Under the "rolling five" method, the withdrawn employer's share of unfunded vested benefits equals its required contributions during the five plan years preceding its withdrawal divided by all contributing employers' contributions during those five years. 29 U.S.C. § 1391(c)(3).

[7] In some cases, as in the case of these coal industry plans, authority to adopt plan amendments is reserved to the settlors, *i.e.*, the employers and the union.

[8] Congress recognized that there is no one "correct" set of actuarial assumptions, but rather a reasonable range of assumptions for each individual plan. *See Senate Labor Summary* at 20-21; H.R. Rep. No. 779, 93d Cong. 2d Sess. 27 (1974) (discussing "reasonable in the aggregate" standard contained in 26 U.S.C. § 412).

and 26 U.S.C. § 412(c)(3) *with* 29 U.S.C. § 1393(a).[9] "Reasonable[ness] in the aggregate," moreover, is susceptible of validation under a gain-and-loss test, which the Internal Revenue Service ("IRS") uses to test plan funding assumptions. *See* 11 Pens. Rep. (BNA) 1330, 1353-58 (Oct. 22, 1984); 11 Pens. Rep. (BNA) at 1625, 1644 (Dec. 24, 1984).[10] If a plan's funding assumptions fail this test, contributions to the plan may not be tax deductible. *See* 26 U.S.C. § 404(a)(1)(A)(i).

The plan's trustees make an initial determination of the amount of an employer's withdrawal liability. 29 U.S.C. § 1382(a). "As soon as practicable" after an employer's withdrawal from a plan, the plan's trustees must notify the employer of the amount of the liability and "demand payment" thereof according to a schedule determined under MPPAA. 29 U.S.C. § 1399(b)(1). The withdrawn employer may then ask the plan's trustees to review any specific matter relating to the withdrawal liability determination or payment schedule, identify any inaccuracy in the determination, or furnish any additional relevant information to the trustees. 29 U.S.C. § 1399(b)(2)(A). The trustees must review the matters raised by the employer and notify the employer of their decision on those matters and the basis for that decision. 29 U.S.C. § 1399(b)(2)(B).

If a dispute over the employer's withdrawal liability remains, either the employer or plan may initiate arbitration, which must "be conducted in accordance with fair and equitable procedures" that have been promulgated by the PBGC. 29 U.S.C. § 1401(a)(2); 29 C.F.R. Part 2641. The arbitrator must presume correct "any determination made by a plan sponsor under sections 4201 through 4219 [of ERISA]," unless the employer "shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A). Similarly, the arbitrator must presume correct the determination of the plan's unfunded vested benefits unless the employer shows by a preponderance of evidence that —

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[9] Section 412 was added to the Internal Revenue Code by ERISA in 1974 and reflects longstanding regulatory practice. *See* Rev. Rul. 63-11, 1963-1 C.B. 94. The IRS' interpretation remains consistent. *See* Rev. Rul. 81-136, 1981-1 C.B. 231; Tax Advisory Memorandum 8427001, *reprinted in* 11 Pens. Rep. (BNA) 979, 979-80 (July 23, 1984).

[10] The professional literature also recognizes the appropriateness of the gain-and-loss test. D.M. McGill, *Fundamentals of Private Pensions* 207 (5th ed. 1984).

> (i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or (ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

29 U.S.C. § 1401(a)(3)(B).

In a MPPAA arbitration, both parties are typically represented by counsel. 29 C.F.R. § 2641.5(c). There is discovery of the types and scope available under the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2641.4(a)(2). Typically, the parties file pre-hearing statements and exchange witness lists. 29 C.F.R. § 2641.4(a)(2). There is a hearing on the record, 29 C.F.R. § 2641.5(d), and each party may present witnesses and documentary evidence, and may cross-examine the other party's witnesses. 29 C.F.R. § 2641.5(e)(3). The arbitrator is empowered to issue subpoenas for the attendance of witnesses and the production of documents. 29 C.F.R. § 2641.4(a)(4). The parties are entitled to file post-hearing briefs. 29 C.F.R. § 2641.5(g). The arbitrator is to decide the case according to the law, rather than, as in commercial or labor arbitration, trying to reach a compromise. 29 C.F.R. § 2641.4(a)(1); *see also* 126 Cong. Rec. H7899 (Aug. 26, 1980) (statement of Rep. Thompson). The arbitrator files a written opinion, giving the reasons for his award, including findings of fact and conclusions of law. 29 C.F.R. § 2641.7(a)(1).

Either party may bring an action in federal court to enforce, vacate, or modify the arbitrator's award. 29 U.S.C. § 1401(b)(2). In such a proceeding, "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 29 U.S.C. § 1401(c). Only following the award can the plan obtain a money judgment to compel payment of the employer's withdrawal liability. 29 U.S.C. §§ 1401(b)(2).[11]

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[11] The plan's "demand" for withdrawal liability does trigger an interim payment requirement, 29 U.S.C. § 1399(c)(2), but it creates no lien and is not self-enforcing. The plan may apply to a court for an order requiring the employer to make scheduled payments pending arbitration. *See* 29 U.S.C. § 1401(d). This is merely a security device for the plan, however, as both the court and arbitrator are empowered to require that such interim payments be returned with interest if the employer prevails in arbitration. *See* 29 U.S.C. § 1401(d); 29 C.F.R. § 2644.2(d).

SUMMARY OF ARGUMENT

Although due process requires those who function in a quasi-judicial capacity to be unbiased, plan trustees do not function in that capacity in assessing and collecting withdrawal liability. Rather their role is akin to that of a prosecutor or a civil plaintiff. This Court's "biased decisionmaker" cases therefore are inapplicable to trustees.

The "presumption of correctness" of trustee determinations under Section 4221(a)(3)(A) of ERISA is actually nothing more than an allocation of the burden of proof to the employer. Moreover, even under a *Mathews v. Eldridge* balancing test,[12] MPPAA's arbitration procedures satisfy due process because there is no threat to fundamental rights; the trial-type procedures available minimize the risk of error, and the allocation of the burden of proof has little effect on the risk of error. Indeed, allocation of the burden to the employer serves the important countervailing interest of screening out marginal cases and arguments that could otherwise result in prohibitive collection costs to plans.

The standard of proof under Section 4221(a)(3)(A), preponderance of the evidence, and the arbitrator's role as the judge of law and fact, permit the arbitrator to decide cases on their merits. There are legal standards to be applied by the arbitrator under Sections 4213(a)(1), 4214, and 4221(a)(3)(A) and (B) of ERISA, even in those areas where trustees may appear to have discretion, calculation of unfunded vested benefits and allocation thereof to withdrawn employers. Where those standards are violated, the arbitrator can and will reverse the plan's determination.

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[12] 424 U.S. 319 (1976).

ARGUMENT

1. *In assessing and demanding withdrawal liability, plan trustees function not as judicial or quasi-judicial decision-makers but rather as private litigants enforcing a legislatively created right.*

MPPAA has been the subject of extensive constitutional litigation in the lower courts almost since its enactment.[13] In 1984 this Court held that the retroactive application of the withdrawal liability provisions of the Act did not violate the Due Process Clause of the Fifth Amendment. *PBGC v. R. A. Gray & Co.*, 467 U.S. 717. Last term, in *Connolly v. PBGC*, ____ U.S. ____, 106 S.Ct. 1018, this Court upheld the imposition of withdrawal liability against a Fifth Amendment takings challenge, noting that in light of *R.A. Gray*, "it would be surprising indeed to discover now that . . . Congress unconstitutionally had taken the assets of the employers there involved." ____ U.S. at ____, 106 S.Ct. at 1025.

It would be just as surprising to discover that while the imposition of withdrawal liability on employers is constitutional as an adjustment of "the burdens and benefits of economic life," *PBGC v. R.A. Gray*, 467 U.S. at 729, (quoting from *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)), the legislative scheme for collecting that liability is somehow constitutionally flawed. As the imposition of withdrawal liability has withstood constitutional scrutiny, so has the process by which the liability is assessed and collected.[14] This is because, in drafting MPPAA, Congress included comprehensive procedures "to assure that the rights of all parties to a fair determination are protected." *Senate Labor Summary* at 20. It was Congress' belief that the prescribed procedures would "result in reasonable determinations [and] ample opportunity for affected parties to challenge the plan's determination of liability. . . ." *Id.*

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[13] *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund*, 762 F.2d 1124 (1st Cir. 1984), *modified*, 762 F.2d 1137 (1985) (*en banc*); *Board of Trustees of Western Conference of Teamsters Pension Trust v. Thompson Building Materials, Inc.*, 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); *Terson Co. v. Bakery Drivers Local 194 Pension Fund*, 739 F.2d 118 (3d Cir. 1984); *Washington Star Co. v. Int'l Typographical Union Negotiated Pension Plan*, 729 F.2d 1502 (D.C.Cir. 1984); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843 (2d Cir.), *cert. denied*, 467 U.S. 1259 (1984); *Peick v. PBGC*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984); *Republic Industries, Inc. v. Teamsters Joint Council No. 83 Pension Fund*, 718 F.2d 628 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984); *Dorn's Transp., Inc. v. IAM Nat'l Pension Fund Benefit Plan*, 578 F.Supp. 1222; *Speckman v. Paddock Chrysler Plymouth, Inc.*, 565 F.Supp. 469 (E.D. Mo. 1983).

Despite this opportunity for employers to challenge withdrawal liability assessments, the Third Circuit found the assessment and review scheme unconstitutional because the plan trustees, who initiate the withdrawal liability assessment process, are allegedly biased against those employers (J.S. App. A at 15-33a). To be sure, due process requires "impartiality on the part of those who function in a judicial or quasi-judicial capacity." *Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). The plan trustees, however, do not function in a quasi-judicial capacity. Rather, under the scheme designed by Congress, that role is assigned to the arbitrator chosen by mutual consent of the parties. Thus, "[r]ather than serving as judicial decision-makers, the trustees are simply part of an administrative procedure set up by Congress for reaching *an initial determination* of withdrawal liability which is then *challengeable in arbitration* and in court." *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund*, 762 F.2d at 1140 (emphasis added). Focus on the alleged bias of the plan trustees, therefore, reflects a

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[14] *Textile Workers Pension Fund v. Standard & Dye Finishing Co.*, 725 F.2d at 854-55; *Washington Star Co. v. Int'l Typographical Union Negotiated Pension Plan*, 729 F.2d at 1511; *Republic Industries, Inc. v. Teamsters Joint Council No. 83 Pension Fund*, 718 F.2d at 639-42; *Board of Trustees of the Western Conference of Teamsters Pension Trust v. Thompson Building Materials, Inc.*, 749 F.2d at 1403-04; *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund*, 762 F.2d 1137.

misunderstanding of the withdrawal liability assessment and review process.[15]

This Court's opinion in *Marshall v. Jerrico*, 446 U.S. 238 (1980), illustrates the appropriate inquiry in cases such as this. At issue in *Jerrico* were provisions of the Fair Labor Standards Act which direct that sums collected as civil penalties for violations of child labor laws be returned to the federal agency that determined the violations, as reimbursement for its costs. An employer contended that this created an impermissible risk of bias on the part of the government administrators who investigate the violations and assess the penalties. In determining that the Due Process right to an impartial adjudicator articulated in *Ward* was not applicable to determinations of the government administrator, the Court noted that the administrator "is not a judge. He performs no judicial or quasi-judicial functions. He hears no witnesses and rules on no disputed factual or legal questions." 446 U.S. at 247. The administrator simply determines the existence of a violation and notifies the employer of the assessment of a penalty, and his assessment is not final if the person charged with a violation enters an exception within a specified period. If an exception is filed, an administrative law judge makes the final determination. 446 U.S. at 244. In the proceedings before the administrative law judge, the administrator's assessment is simply given the effect of a complaint. 446 U.S. at 248. Thus, the Court reasoned, "the function of assessing a violation is akin to that of a prosecutor or civil plaintiff" and need not meet the constitutional requirements imposed on those performing judicial functions. 446 U.S. at 447.

The function of plan trustees in assessing withdrawal liability is no different. They do not hear witnesses or weigh conflicting evidence. Nor do they make a decision that is final. They simply make an initial determination, based on the facts available to them, that a withdrawal has occurred. *See* 126

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[15] The Court of Appeals noted that the availability of a trial *de novo* by an unbiased judge does not remove the constitutional infirmity in an original trial before a biased tribunal (J.S. App. A at 27a). *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972). As this Court recognized in *Marshall v. Jerrico*, 446 U.S. 238, however, *Ward's* requirement of an impartial tribunal *in the first instance* is inapplicable where the initial determination is not an adjudication. 446 U.S. at 247, n.9.

Cong. Rec. H7899 (daily ed. Aug. 26, 1980) (statement of Rep. Thompson). A demand for withdrawal liability, with a schedule of payments, is then issued. 29 U.S.C. § 1399(b). As the term implies, the "demand" is not self-enforcing, *see* 29 U.S.C. § 1401(b)(1), (d), and simply represents the plan's claim, much like a civil complaint or administrative charge. On receiving the demand, the employer may request that the plan review "any specific matter" relating to the plan's determination. 29 U.S.C. § 1399(b)(2)(A)(i). This "informal review" serves to "clarify and perhaps pare down the issues. . . ." *Grand Union Co. v. Food Employers Labor Relations Association*, No. 85-6160, slip op. at 9 (D.C.Cir. Jan. 13, 1987), but again the plan's "decision" on review, 29 U.S.C. § 1399(b)(2)(B), is not final or self-enforcing. The review process is simply "private ordering" of the issues as a prelude to arbitration. *Grand Union*, slip op. at 10.

If a dispute remains following this informal review, the parties proceed to arbitration. 29 U.S.C. § 1401(a)(1). Only at this point is a trial-type proceeding held with the provision for discovery, witnesses and argument. 29 C.F.R. §§ 2641.1-2641.9. And, only following that proceeding is there a final decision which can be enforced. 29 U.S.C. § 1401(b)(2),(d). In short, in the withdrawal liability scheme designed by Congress, the arbitrator is the decision-maker. The plan trustees, like the administrator in *Marshall v. Jerrico*, are merely litigants. Because their role is "akin to that of a prosecutor or civil plaintiff," *Marshall v. Jerrico*, 446 U.S. at 447, the Due Process right to an impartial adjudicator is simply inapplicable to the trustees' initial assessment and demand for withdrawal liability.

2. *Withdrawal liability determinations are reviewed by an impartial decision-maker, the arbitrator, and Section 4221(a)(3)(A) of ERISA represents a rational allocation of the burden of proof to the employer contesting the determination.*

The withdrawal liability arbitrator clearly does function in a "judicial or quasi-judicial role." *See* 29 U.S.C. § 1401(a)(1). Regulations promulgated by the PBGC assure that the arbitrator chosen by the parties is, and remains, free from bias. 29 C.F.R. § 2641.3(b),(c). Contrary to the conclusion of the Third Circuit, the impartiality of the arbitrator is not marred by the "presumption of correctness" found in Section 4221(a)(3) of ERISA, which provides that, in arbitration, a plan sponsor's determination will be "presumed correct" unless the employer demonstrates by a preponderance of the evidence that the determination was unreasonable or clearly erroneous. 29 U.S.C. § 1401(a)(3). Although cast in terms of a "presumption," this section reflects nothing more than the allocation to the withdrawing employer of the burden of proving the initial withdrawal liability assessment incorrect or contrary to law and it has been recognized as such by courts and arbitrators applying this provision. *Republic Industries, Inc. v. Teamsters Joint Council No. 83 Pension Fund*, 718 F.2d 628; *Washington Star Co. v. Int'l Typographical Union Negotiated Pension Plan*, 729 F.2d 1502; *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843; *Terson Co. v. Bakery Drivers Local 194 Pension Fund*, 4 EBC 2024 (D.N.J.), *aff'd*, 739 F.2d 118 (3d Cir. 1984); *Republic Industries, Inc. v. Central Pa. Teamsters Pension Fund*, 3 EBC 1299 (E.D. Pa. 1982); *Calvert and Youngblood Coal Co. v. UMWA 1950 and 1974 Pension Plans*, 5 E.B.C. 2361 (1984) (Polak, Arb.).

This Court has recognized that a statutory provision may have the "aura" of a rebuttable presumption but, in fact, be nothing more than an allocation of the burden of persuasion to a particular party with respect to an issue or claim. *Lavine v. Milne*, 424 U.S. 577 (1976). Moreover, while the assignment of a burden of persuasion is not without consequence, this Court has recognized that "[o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Id.* at 584. Even if the burden allocated to a party by the legislature is a heavy one, "it is not for this Court to assay the wisdom of that determination." *Id.* at 587.[16]

Indeed, our jurisprudence reflects countless examples of legislative choices allocating between plaintiffs and defendants burdens of persuasion and burdens of producing evidence, whether designated as such or labelled presumptions. *See, e.g.*, *Vance v. Terrazus*, 444 U.S. 252, 268-69 (1980); *Lavine v. Milne*, 424 U.S. at 585; *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508-509 (1957); *New York Life Ins. Co. v. Gamer*, 303 U.S. 161 (1938); *Welch v. Helvering*, 290 U.S. at 115; *Cockrill v. California*, 268 U.S. 258 (1925); *Illinois Physicians Union v. Miller*, 675 F.2d 151 (7th Cir. 1982); *Purifoy v. Mercantile-Safe Deposit and Trust Co.*, 398 F.Supp. 1082 (D.Md. 1975), *aff'd*, 567 F.2d 268 (4th Cir. 1977). Even if MPPAA's assignment of the burden of proof in arbitration to the employer is scrutinized under the procedural due process test articulated in *Mathews v. Eldridge*, 424 U.S. 319,[17] it clearly passes constitutional muster.

Applying *Eldridge* here, three factors must be balanced to determine whether this allocation satisfies due process: the interest of the employer affected by the withdrawal liability assessment; the risk of error created by the allocation of the burden of proof to the employer and the probable value of alternative procedures; and, the countervailing legislative interest supporting the chosen allocation. 424 U.S. at 335.

The assessment of withdrawal liability may eventually result in the deprivation of an employer's property. But, although an assessment can affect the finances of an employer, it clearly poses no threat to liberty interests, *see Santosky v. Kramer*, 455 U.S. 745 (parental rights), nor to fundamental property interests, such as government benefits necessary for an individual's or family's subsistence. *See Goldberg v. Kelly*, 397 U.S. 254 (1970) (public assistance).

The risk that an error will be made in arbitration is not significantly heightened by the assignment of the burden of proof to the employer rather than to the plan. Indeed, because the employer must prove its case only "by a preponderance of the evidence," the parties actually "share the risk of error in roughly equal fashion." *Addington v. Texas*, 441 U.S. 418, 423 (1979). The allocation of the burden to the employer simply requires it to come forward with specific challenges to the trustees' determination and to support these with evidence and argument. *Washington Star Co. v. Int'l Typographical Union Negotiated Pension Plan*, 729 F.2d at 1511.

Moreover, the arbitration regulations issued by the PBGC are designed to ensure that the arbitration proceedings will be directed toward seeking the truth. A panoply of discovery tools are available to both parties, and the arbitrator may impose sanctions and issue subpoenas to assure that each party has a meaningful opportunity to develop and present its case. 29 C.F.R. § 2641.4(a)(2),(4). Once discovery is completed, a hearing on the record is held. 29 C.F.R. § 2641.5(d). Witnesses may be presented for testimony under oath and may be cross-examined. 29 C.F.R. § 2641.4(a)(4). Briefs may be submitted by the parties in support of their positions. 29 C.F.R. § 2641.5(g). Finally, the arbitrator renders a "written award" which includes findings of fact and conclusions of law. 29 C.F.R. § 2641.7(a)(1). That award is reviewable in a United States district court. 29 U.S.C. § 1401(b)(2),(c).

Thus, given the traditional truth-seeking procedures afforded the parties in arbitration and the simple "preponderance of the evidence" standard, the risk of error created by requiring the employer to put on its case first is hardly significant. Surely, it is no greater than requiring instead that the plan trustees bear that burden.[18]

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[16] The burden of proof need not necessarily be placed on the party seeking to change the status quo. *See Welch v. Helvering*, 290 U.S. 111, 115 (1935); *Wickwire v. Reinecke*, 275 U.S. 101 (1927). In any event, as one thoughtful arbitration opinion suggests, the employer may properly be viewed as the party seeking to change the status quo. At the time of an employer's withdrawal, the status quo is represented by the employer's regular payment of contributions to the plan. MPPAA seeks to preserve this situation by requiring the withdrawn employer to make periodic payments to the fund at a level which approximates its pre-withdrawal contributions. Thus, it is the employer who seeks to modify the status quo. *See Fraser Shipyards, Inc. v. IAM Nat'l Pension Fund*, 7 EBC 2562, 2581 (1986) (Cornelius, Arb.).

[17] This Court has applied the *Eldridge* test to determine whether the standard of proof in a parental rights termination hearing—preponderance of the evidence—satisfies due process. *Santosky v. Kramer*, 455 U.S. 745 (1982). This suggests that *Eldridge* may be applicable to due process challenges of burden of proof allocations as well, despite *Lavine*'s statement that this is not a question of constitutional moment.

The allocation of the burden to the employer is particularly appropriate in light of the interests Congress sought to promote in mandating this allocation. Congress feared that unless the burden of going forward with a specific challenge to the plan's determination was placed on the employer, it could "effectively nullify [its] obligation by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination." H.R. Rep. No. 869, 96th Cong., 2d Sess. 86, *reprinted in* 1980 U.S. Code Cong. & Ad. News, 2918, 2954. Congress realized that, without the "presumption of correctness," "a plan would be helpless to resist dilatory tactics by a withdrawing employer — tactics that could, and could be intended to, result in prohibitive collection costs to the plan." *Senate Labor Summary* at 21. By making it extraordinarily difficult to collect withdrawal liability, such tactics could effectively subvert the legislature's goals in creating withdrawal liability in the first place.[19] The "presumption of correctness" protects those goals from erosion. While assignment of the burden of persuasion to the plan trustees rather than to the employer might bolster the employers' perception that justice has been done, the risks to the plan and to the purposes of the Act would clearly outweigh any such benefit. Thus, to the extent that the legislative assignment of the burden of proof in civil proceedings is of constitutional significance, it satisfies the balancing test articulated in *Mathews v. Eldridge* in this instance.

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[18] With respect to most determinations that must be made, *e.g.*, when operations ceased, 29 U.S.C. § 1393(a) (2), whether certain operations were a separate facility, 29 U.S.C. § 1397, whether a sale of assets was bona fide, 29 U.S.C. § 1384, the evidence is largely within the knowledge or control of the employer. Thus, it might well increase the risk of error for the plan to be required to put on its case first.

[19] Without the presumption, there would be "lengthy, futile and costly bickering" over matters to which there are several "correct" approaches, leading to a proliferation of meritless disputes because employers believe they can "slip a marginal case for another amount past a sympathetic arbitrator." *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund*, 762 F.2d at 1144-45.

3. *The standard applied by the arbitrator does not insulate plan determinations from effective review.*

To prevail in arbitration under Section 4221(a)(3)(A) of ERISA, the employer must prove by a preponderance of the evidence that the plan sponsor's determination was "unreasonable" or "clearly erroneous." 29 U.S.C. § 1401(a)(3)(A). A literal reading of Section 4221(a)(3)(A), standing alone, may therefore be confusing because it joins a trial-type standard ("a preponderance of the evidence") with an appellate-type standard ("unreasonable or clearly erroneous"). 29 U.S.C. § 1401(a)(3)(A). It is clear from Section 4221(c), however, which specifies that the arbitrator is to make "findings of fact," that the arbitrator is to function in the manner of a trial court, not an appellate or reviewing tribunal. 29 U.S.C. § 1401(c). MPPAA's legislative history also clarifies this. "The committee intends that the role of the arbitrator under this act will be similar to that of a judge applying applicable law *to the facts presented* . . ." 126 Cong.Rec. H7899 (daily ed. Aug. 26, 1980) (statement of Rep. Thompson) (emphasis added). Similarly, PBGC regulations require the arbitrator to render an award which sets forth "findings of fact and conclusions of law." 29 C.F.R. § 2641.7(a)(1).[20] Indeed, because neither the plan's initial withdrawal liability determination nor its decision on review, 29 U.S.C. §§ 1382(a), 1399(b)(2)(B), involve live testimony or determinations of credibility, it is obvious that the arbitrator will be required to make a record for the first time and, on the basis of that record, resolve the issues as the judge of law and fact. Once he does, *his* findings of fact will be reviewable under the "clearly erroneous" standard of ERISA Section 4221(c), and his conclusions of law will be reviewable *de novo*, in the manner of an appellate review. *E.g., Board of Trustees of Western Conference of Teamsters Pension Trust v. Thompson Building Materials, Inc.*, 747 F.2d at 1405-06.

In short, the terms "clearly erroneous" and "unreasonable" in Section 4221(a)(3)(A) were not used in any technical sense connoting limited appellate-type review. Rather, they were intended to emphasize that the employer bears the burden of proof.[21] Thus, the standard of review established by MPPAA for such issues as "cessation of covered operations," 29 U.S.C. § 1383(a), or identification of a "facility," 29 U.S.C. § 1397, does not preclude effective review.

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[20] The arbitrator is directed to "follow applicable law, as embodied in statutes, regulations, court decisions, interpretations of agencies charged with enforcement of the Act, and other pertinent authorities." 29 C.F.R. § 2461.4(a) (1).

Section 4221(a)(3)(B) of ERISA sets forth a separate test for reviewing actuarial assumptions. Under that Section, the employer must prove by a preponderance of the evidence that—

> the actuarial assumptions and methods used in the determination [of unfunded vested benefits] were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations).

29 U.S.C. § 1401(a)(3)(B)(i). The Court of Appeals concluded, without referring to Section 4221(a)(3)(B), that *de novo* review of actuarial assumptions is required to remove what it perceived as the taint of bias. This was based on its conclusion that, in this area, trustees have significant discretion, and that their status as fiduciaries may cause them to use that discretion to maximize withdrawal liability. (J.S. App. A at 21-30a). The Court never said what substantive standard the arbitrator should apply, and apparently overlooked Section 4213(a) of ERISA, which, in words that mirror Section 4221(a)(3)(B)(i), sets forth the substantive standard that actuarial assumptions must meet. Had the Court examined Section 4213(a), it would have recognized that trustees do not have discretion in setting actuarial assumptions.

Section 4213(a) makes it clear that actuarial assumptions must be reasonable in the aggregate and that they must be set by the plan's actuary, not by the trustees:

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[21] While Congress' use of the terms in conjunction with "preponderance of the evidence" caused one arbitrator to conclude in frustration that they are "virtual nonsense," *Fraser Shipyards v. IAM Nat'l Pension Fund*, 7 E.B.C. at 2571 n.19, it does not appear that the infelicitous drafting of Section 4221(a)(3)(A) prevented that arbitrator from conscientiously deciding the case on its merits. *See id.* at 2584. Nor are these *amici* aware of any arbitration cases where application of a too-narrow view of the standard of arbitral review was outcome-determinative.

> withdrawal liability under this part shall be determined by each plan on the basis of—
>
> (1) actuarial assumptions which, *in the aggregate, are reasonable* (taking into account the experience of the plan and reasonable expectations) and which in combination offer *the actuary's best estimate* of anticipated experience under the plan.

29 U.S.C. § 1393(a)(1) (emphasis added). This standard is virtually identical to the standard that applies to actuarial assumptions used for funding purposes under Section 302(c)(3) of ERISA and Section 412(c)(3) of the Internal Revenue Code ("Code"), 29 U.S.C. § 1082(c)(3), 26 U.S.C. § 412(c)(3), and Congress made it clear in enacting those provisions that the phrase "actuary's best estimate" requires requires that actuarial assumptions be "independently determined by the actuary," and that the plan sponsor not "substitute his judgment for that of a qualified actuary." S. Rep. No. 383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4890, 4954.[22].

The actuary is directed by Section 4213(a) to select assumptions that "in the aggregate, are reasonable," a standard that has a settled meaning. Even before ERISA, the IRS had said that in valuing pension plan liabilities, "it is not required that each individual [actuarial] assumption used be reasonable. It is merely required that the combination of all assumptions produces reasonable results." Rev. Rul. 63-11, 1963-1 C.B. 94. And this is precisely what Congress intended when, in enacting Section 302(c)(3) of ERISA and Section 412(c)(3) of the Code in 1974, it specified that actuarial assumptions used for funding purposes must be reasonable "in the aggregate." Congress noted that the "test would be whether all actuarial assumptions used together are reasonable." H.R. Rep. No. 779, 93d Cong., 2d Sess. 27 (1974) (emphasis added).

When it adopted MPPAA in 1980, recognizing that withdrawal liability is designed to restore the loss to the plan's contribution base when an employer withdraws, 126 Cong. Rec. S10098 (July 29, 1980) (statement of Sen. Williams), Congress chose the same standard—reasonable in the aggregate—for withdrawal liability assumptions as for funding assumptions. *Compare* 29 U.S.C. § 1393(a)(1) *with* 29 U.S.C. § 1082(c)(3). Indeed, Congress specifically indicated that assumptions that are appropriate for funding purposes would generally be valid for withdrawal liability purposes. 126 Cong. Rec. H7901 (Aug. 26, 1980) (statement of Rep. Thompson). To this end, it established a safe harbor in Section 4213(b) of ERISA, under which an actuary may use the plan's funding assumptions for withdrawal liability purposes. 29 U.S.C. § 1393(b).

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[22] Shortly after the enactment of ERISA, the Labor Department recognized that an actuary is not a fiduciary. 29 C.F.R. § 2509.75-5 (Q&A D-1). Moreover, setting of actuarial assumptions or any other action required under Title IV of ERISA is not an exercise of fiduciary responsibility. ERISA § 4023, 29 U.S.C. § 1323.

No standard other than the "reasonableness" standard of Section 4213(a)(1) is possible. Actuarial assumptions are used to assure that enough money will be paid into a plan that it will be able to pay promised benefits. This requires predicting future events, such as mortality and earnings, that are inherently uncertain. GAO Liabilities Report at 32-33. Because these events will occur over decades, assumptions cannot be said to be "correct" or "incorrect" at the time they are adopted. They can only be determined to be reasonable or unreasonable based on experience gains and losses.[23] No better standard is possible unless one waits until the plan pays its last dollar to its last participant on the day he dies, at which point one can conclude that the assumptions were "correct." Moreover, Congress need not, under decisions of this Court, achieve a perfect fit between its goals and its legislative solutions. *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund*, 762 F.2d at 1144 (citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); and *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955)). And if the Court of Appeals' concern was not with this substantive standard but with the notion that trustees have discretion to decide what is reasonable, that concern disappears when one recognizes

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[23] Both the IRS and the professional literature recognize a simple mathematical gain-and-loss test for evaluating the reasonableness of actuarial assumptions. 11 Pen. Rep. (BNA) at 1353-58; 11 Pen. Rep. at 1625, 1644; D.M. McGill, *Fundamentals of Private Pensions* at 207.

that Section 4213(a)(1) removes the trustees from the process by requiring the plan to adopt assumptions that represent the "actuary's best estimate."

With this background, it is clear that when Section 4221(a)(3)(B) of ERISA provides that in arbitration, the employer must prove by a preponderance of the evidence that the plan's actuarial assumptions were "in the aggregate, unreasonable," it simply mirrors the substantive standard of Section 4213(a)(1). Thus, it does not insulate the plan's assumptions from effective review. If the employer proves that the plan's assumptions do not meet this standard, informed as it is by consistent IRS interpretation, he will be entitled to an award in his favor. Likewise, if he proves that the assumptions though perhaps "reasonable" were not the "actuary's best estimate" as meant by Section 4213(a)(1), but instead that the trustees impermissibly substituted their own judgment, he will be entitled to prevail. The Court of Appeals simply lost sight of these governing statutory provisions.

The Court of Appeals was also mistaken in thinking that trustees could deliberately choose an allocation method to maximize withdrawal liability. It is true that each of the four methods authorized by Section 4211 of ERISA, 29 U.S.C. § 1391, will yield a different result for a particular employer. An allocation method, however, is chosen *a priori*, as a matter of plan design, and its impact on employers who withdraw thereafter is fortuitous. Trustees cannot identify a withdrawn employer and then decide to apply an allocation method that will yield the highest withdrawal liability assessment. Section 4214(a) of ERISA prevents just such gerrymandering, in providing that no plan amendment authorized under Section 4211(c)(1)[24] may be applied "with respect to liability for a [complete] withdrawal or partial withdrawal which occurred before the date on which the . . . amendment was adopted." 29 U.S.C. § 1394(a). Nor having adopted an allocation method, are the trustees permitted to apply that method to some employers and another method to others, depending on which yields the highest assessment in each case. *See* ERISA Section 4214(b) ("[a]ll plan . . . amendments authorized under this part shall operate and be applied uniformly . . ."). 29 U.S.C. § 1394(b). If in arbitration the employer proves by a preponderance of the evidence that the legal standards applicable to allocation methods were violated, he will be entitled to an award in his favor. *See Dravo Corp. v. IAM Nat'l Pension Fund*, 6 EBC 2641 (1985) (Mittleman, Arb.).

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[24] If a plan wishes to use any allocation method other than the presumptive method, it must adopt it by plan amendment. ERISA § 4211(c)(1), 29 U.S.C. § 1391(c)(1).

In sum, the trustees' role in assessing withdrawal liability does not confer discretion to maximize an employer's liability, and arbitration provides a full and fair review of whether the applicable legal standards were followed. Due Process requires no more.

CONCLUSION

Upon the foregoing, the decision of the Court of Appeals for the Third Circuit was in error, and should be reversed.

Respectfully submitted,
GERALD E COLE, JR.
General Counsel

ISRAEL GOLDOWITZ*
Deputy General Counsel

ANDRÉE M. St. MARTIN
Senior Associate Counsel

THOMAS S. GIGOT
Senior Associate Counsel

EDWARD J. GILMARTIN
Associate Counsel

UMWA Health & Retirement Funds
Office of General Counsel
2021 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 452-5034

Counsel for the Amici Curiae the Trustees of the UMWA 1950 and 1974 Pension Plans

*Counsel of Record

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No. 86-231

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

PENSION BENEFIT GUARANTY CORPORATION,
Appellant
v.
YAHN & McDONNELL, INC., *et al.*,
Appellees

On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF APPELLANT PENSION BENEFIT GUARANTY CORPORATION

Of Counsel:
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

CONNERTON & BERNSTEIN
1899 L Street, N.W.
Washington, D.C. 20036
(202) 466-6792

GERALD M. FEDER *
DAVID R. LEVIN
NIK B. EDES
FEDER & ASSOCIATES
1527 18th Street, N.W.
Washington, D.C. 20036
(202) 387-1515
Attorneys for National Coordinating Committee for Multiemployer Plans

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-231

PENSION BENEFIT GUARANTY CORPORATION,
Appellant
v.

YAHN & MCDONNELL, INC., *et al.*,
Appellees

On Appeal from the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF APPELLANT PENSION BENEFIT GUARANTY CORPORATION

The National Coordinating Committee for Multiemployer Plans ("NCCMP") submits this brief *amicus curiae* in support of Appellant, Pension Benefit Guaranty Corporation ("PBGC"). Written consent of counsel for Appellant and Appellees to this NCCMP submission has been filed with the Clerk of the Court.

INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The court of appeals in the instant case reviewed section 1401(a)(3)(A) of the Employee Retirement Income Security Act ("ERISA") as amended by the Multiemployer Pension Plan Amendments Act of 1980

("MPPAA"), 29 U.S.C. § 1401(a)(3)(A). That statutory section provides that the determination of an employer's withdrawal liability by multiemployer plan trustees is presumed to be correct, unless the employer shows by a preponderance of the evidence presented to an impartial arbitrator that the trustees' determination is unreasonable or clearly erroneous. The court below, contrary to the view of every other circuit court to address the issue,[1] held that the rebuttable presumption of correctness in favor of the trustees violates the Due Process Clause of the Fifth Amendment. The NCCMP submits this brief urging reversal of the decision below.

The NCCMP is a tax-exempt, nonprofit corporation organized to represent the interests of the more than nine million workers who participate in collectively bargained multiemployer plans. The NCCMP's affiliates include over 180 multiemployer plans and related international unions. Its affiliates together represent the great majority of the participants in multiemployer plans. The NCCMP actively participated throughout the development and Congressional consideration of MPPAA. *See Connolly v. PBGC*, —— U.S. ——, 89 L.Ed.2d 166, 173 n. 1 (1986). It is our belief that this legislation, including the provision challenged here, is essential to the viability of the federal pension benefit guaranty program established by MPPAA and contained in Title IV of ERISA. If the decision below is sustained, we are concerned that the result will be to disrupt severely the

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[1] *See Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Industry Pension Fund*, 762 F.2d 1137 (1st Cir. 1985) (en banc); *Board of Trustees v. Thompson Building Materials, Inc.*, 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502 (D.C. Cir. 1984); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843 (2d Cir.), *cert. denied sub nom. Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers International*, 467 U.S. 1259 (1984); *Republic Industries, Inc. v. Teamsters Joint Council No. 83*, 718 F.2d 628 (4th Cir.), *cert. denied*, 467 U.S. 1259 (1984).

operation of multiemployer pension plans, to frustrate the collection of appropriate amounts of withdrawal liability, and, thereby, to endanger the retirement security of millions of American workers who participate in these pension plans.

SUMMARY OF REASONS FOR REVERSAL

A. This Court has upheld the constitutionality of the imposition of withdrawal liability as a rational Congressional response to the need for safeguarding the solvency of multiemployer pension plans. *Connolly v. PBGC*, —— U.S. ——, 89 L.Ed.2d 166 (1986); *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984). Multiemployer plan administrators—*i.e.*, each plan's joint board of labor and management trustees, 29 U.S.C. §§ 1002(16)(A)(ii) and (16)(B)(iii)—determine the amount of an employer's withdrawal liability using one of four statutorily mandated methods of calculation. 29 U.S.C. §§ 1391(b), (c)(2), (c)(3), and (c)(4). MPPAA requires that the trustees uniformly apply the chosen method of calculation to all withdrawing employers. 29 U.S.C. § 1394(b), The determination of withdrawal liability involves the use of complex actuarial assumptions, 29 U.S.C. § 1391, so the trustees must rely on the expertise of the plan's actuary. In the event of a dispute over a withdrawal liability determination, the employer or the trustees may initiate arbitration in accordance with "fair and equitable procedures" promulgated by the PBGC, 29 U.S.C. § 1401(a)(2). In the arbitration proceeding, the trustees' determination of withdrawal liability is presumed correct, 29 U.S.C. § 1401(a)(3)(A); however, the presumption is rebuttable, *id.*

The court below held that trustees, in making withdrawal liability determinations, play an adjudicatory role. The court below further held that the trustees, as adjudicators, have an inherent bias to maximize their calculation of withdrawal liability, thereby denying employers their due process right to an impartial adjudicator. Contrary to the holding below, every other circuit court to address the issue has held that the trustees' determination of withdrawal liability is a matter of general plan administration, not adjudication. *See, e.g., Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund*, 762 F.2d 1137 (1st Cir. 1985) (en banc). This administrative determination of the trustees is subject to review by impartial adjudicators: first by an arbitrator chosen by the employer and the trustees, and then by the federal judiciary. 29 U.S.C. §§ 1401(a) and (b)(2). The MPPAA arbitration process and the availability of judicial review are consistent with this Court's "powerful and independent constitutional interest in fair adjudicative procedure." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980).

B. To correct the constitutional flaw of what it perceived as a trustee bias against withdrawing employers, the court below struck down as unconstitutional the rebuttable presumption that the trustees' determination of withdrawal liability is correct. In so doing, the court below ignored the numerous opinions of this Court upholding the constitutionality not only of rebuttable presumptions, *Mobile, J. & K.C.R. v. Turnipseed*, 219 U.S. 35 (1910), but also of irrebuttable presumptions, *Weinberger v. Salfi*, 422 U.S. 749 (1975).

Given the Congressionally articulated need to preserve multiemployer pension plans and safeguard their solvency, *Connolly*, 89 L.E.2d at 180-81, the rebuttable presumption of correctness is a rational means to promote uniformity in the calculation of withdrawal liability and to discourage dilatory tactics by withdrawing employers —"tactics that could, and could be intended to, result in prohibitive collection costs to the plan." Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., *S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* 20-21 (1980). Moreover, as a practical matter, employers have successfully rebutted the presumption in nearly half the reported MPPAA arbitration cases, and arbitrators have, consequently, reversed or substantially modified trustee withdrawal determinations. *See* cases cited *infra* note 10. The rebuttable presumption of correctness accorded the initial trustees' determination of withdrawal liability in no manner precludes any party to the dispute from a full hearing by neutral adjudicators consistent with the dictates of due process.

REASONS FOR REVERSAL

A. The Initial Adjudication To Resolve Disputes Over Withdrawal Liability Is Conducted By An Impartial Arbitrator, Not By Plan Trustees.

This Court is intimately familiar with the impetus giving rise to the enactment of MPPAA. *Connolly v. PBGC*, —— U.S. ——, 89 L.Ed 2d 166, 171-74 (1986); *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 721-23 (1984). In upholding the constitutionality of the statute, this Court summarized the rationale for MPPAA:

> . . . Congress determined that unregulated withdrawals from multiemployer plans could endanger their financial vitality and deprive workers of the vested rights they were entitled to anticipate would be theirs upon retirement. For this reason, Congress imposed withdrawal liability as one part of an overall statutory scheme to safeguard the solvency of private pension plans.

Connolly, 89 L.Ed.2d 180-81.

When an employer withdraws from participation in a multiemployer pension plan, MPPAA requires that the employer pay to the plan "the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of vested benefits and the current value of the plan's assets." *R.A. Gray*, 467 U.S. at 725. The plan administrator—who, in the case of multiemployer plans, is the joint board of labor and management trustees, 29 U.S.C. §§ 1002(16)(A)(ii) and (16)(B)(iii)—must use the "presumptive" method for calculating the employer's liability, 29 U.S.C. § 1391(b), unless the plan has been amended to permit the calculation of withdrawal liability using one of three alternative methods, 29 U.S.C. §§ 1391(c)(2), (3) or (4).

Thus, the selection of a method to calculate withdrawal liability is a general plan administrative matter performed by the plan's administrator, *i.e.*, the trustees. Moreover, once an allocation method has been selected for the plan, either by operation of law or by amendment under 29 U.S.C. § 1391(c), MPPAA requires that the method of calculation be uniformly applicable to all withdrawing employers, 29 U.S.C. § 1394(b).[2]

All of the withdrawal liability calculation methods require the use of certain actuarial assumptions, which must be "reasonable" and "offer the actuary's best estimate of anticipated experience under the plan," 29 U.S.C. § 1393(a).[3] Consequently, trustees must rely heavily, if not almost exclusively, on the expertise of the plan's actuary to determine a reasonable interest rate and other assumptions necessary to make the withdrawal liability calculations.[4] *See* Comptroller General of the United

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[2] In addition, no plan rule or amendment under 29 U.S.C. § 1391(c) "may be applied without the employer's consent with respect to liability for a withdrawal or partial withdrawal which occurred before the date on which the rule or amendment was adopted." 29 U.S.C. § 1394(a).

[3] Pursuant to 29 U.S.C. § 1241, the Secretaries of Labor and the Treasury established a Joint Board for the Enrollment of Actuaries. This Joint Board has promulgated regulations, which prescribe standards of performance for actuarial services, 20 C.F.R. § 901.20, and penalties for failure to adhere to these standards, 20 C.F.R. § 901.31.

[4] Because of the sensitivity of the cost estimates to the interest assumption the rate must be chosen with great care. "The rate should represent the expected rate of return on plan assets over

States, GAO/HRD-85-16, *Effects of Liabilities Assessed Employers Withdrawing From Multiemployer Pension Plans* (1985).

Once the trustees notify the employer of the amount of its withdrawal liability, the employer may request the trustees to review "any specific matter relating to the determination of the employer's liability," 29 U.S.C. § 1399(b)(2)(A)(i), based on any additional relevant information supplied by the employer. 29 U.S.C. § 1399(b)(2)(A)(iii). "After a reasonable review" by the trustees, 29 U.S.C. § 1399(b)(2)(B), if there remains a dispute between the employer and the trustees, either party may initiate arbitration "in accordance with fair and equitable procedures to be promulgated by the [Pension Benefit Guaranty C]orporation." 29 U.S.C. § 1401(a)(2).

In the arbitration proceeding, the trustees' determination of withdrawal liability is presumed correct unless the employer shows "by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A). Lastly, either the employer or the trustees may file an action in federal district court to "enforce, vacate, or modify" the arbitrator's decision. 29 U.S.C. § 1401(b)(2).

The *Yahn* court held that, with respect to the withdrawal liability determination procedures, trustees function as adjudicators. The court below further held that the trustees have an inherent bias to maximize assessments of withdrawal liability, which results in the denial of withdrawing employers' due process right to an impartial adjudicator.[5]

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the long term. It should not be changed to reflect fluctuations in the financial market that appear to be transitory or of short-term duration." D. McGill, *Fundamentals of Private Pensions* at 325 (3d ed. 1975).

[5] The *Yahn* court's conclusory statements about trustee bias are unsupported by any evidence other than a description of the statu-

However, trustees do not play an adjudicatory role. Rather, they "are simply part of an administrative procedure set up by Congress for reaching an initial determination of withdrawal liability which is then challengeable in arbitration and in court." *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Frnd, Inc.*, 762 F.2d 1137, 1140 (1st Cir. 1985) (en banc). And, if the trustees are not adjudicators, they cannot be biased adjudicators.[6]

The trustees are by definition the plan's "administrator," 29 U.S.C. § 1002(16)(A)(ii) and 16(B)(iii). Consequently, their role "is one of administration or enforcement rather than adjudication." *Dorn's Transp., Inc. v. I.A.M. Nat. Pension Fund*, 578 F. Supp. 1222, 1237 (D.D.C. 1984). Certainly, the initial determination of the amount of withdrawal liability is made by the trustees, based on calculations performed and decisions made by the plan's actuary.[7] Yet making a determination con-

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tory role of trustees. As this court noted in *Schweiker v. McClure*, 456 U.S. 188, 196 n.10 (1982), assertions of bias "require substantiation before they can provide a foundation for invalidating an Act of Congress."

[6] This Court need not decide the novel issue of whether plan trustees' satisfaction of their fiduciary duty to collect money owed the trust demonstrates a "manifest and significant bias," *Yahn*, 787 F.2d at 140. Nonetheless, we note that in H.R. Rep. 96-869, 96th Cong., 2d Sess. 67 (1980), the Congress made "it clear that the trustees' role is not simply to find the highest value for withdrawal liability; they would not meet their fiduciary duty to the fund, for example, if they set excessively high withdrawal liabilities which would have the effect of discouraging future participation." *Keith Fulton*, 762 F.2d at 1142-43.

[7] For example, the plan's actuary calculates the value of the plan's unfunded vested benefits. This critical calculation—which is the basis for determining an employer's liability under any method permitted under ERISA, 29 U.S.C. §§ 1391(b) and 1391(c)(2), (3), and (4)—is presumed correct, unless an employer demonstrates by a preponderance of the evidence that the actuarial assumptions and methods "were, in the aggregate, unreasonable" or that the plan actuary "made a significant error in applying the

cerning an obligation to pay money no more converts a trustee into an adjudicator than does a trustee decision to pay or deny benefits, or a trustee determination to collect delinquent contributions and assess liquidated damages. *See* 29 U.S.C. § 1132(g)(2).

Due process does not demand impartiality on the part of every decision maker. Rather, "due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities," *Schweiker v. McClure*, 456 U.S. at 195. The inherent trustee right to calculate and collect amounts owed the trust has never before been found to convert a trustee into an adjudicator. This independent right of trustees is a fundamental prerequisite to the discharge of all fiduciary duties found at common law; all such duties that are detailed in ERISA; and those fiduciary duties that have been interpreted by the federal judiciary. *See, e.g.*, 2 SCOTT ON TRUSTS § 177 (3d ed. 1967); *Jim McNeff Inc. v. Todd*, 461 U.S. 260 (1983); 29 U.S.C. §§ 1132(g)(2), 1342(d)(1)(B)(ii).

It is only after the trustees make their determination of liability that MPPAA provides for the "Resolution of Disputes," 29 U.S.C. § 1401. This adjudicatory stage of dispute resolution, to which a due process analysis is appropriately applied, begins with the arbitration proceeding prescribed at 29 U.S.C. § 1401.

The arbitration proceeding required by MPPAA must be conducted according to "fair and equitable procedures" established by the PBGC. 29 U.S.C. § 1401(a)(2). The arbitration procedures, which were finally promulgated by the PBGC in August 1985 after several years of careful review, painstakingly assure that both the withdrawing employer and the plan trustees are full and equal participants in the selection of the arbitrator. 29 C.F.R. § 2641.3.

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actuarial assumptions or methods," 29 U.S.C. § 1401(a)(3)(B). The *Yahn* court did not declare this presumption to be unconstitutional.

To ensure complete impartiality, an arbitrator must disclose any bias or interest in the outcome of the arbitration which should result in the arbitrator's disqualification and withdrawal, 29 C.F.R. § 2641.3(b). Moreover, at any time before the final award is made, any party may challenge the arbitrator's impartiality and seek his/her withdrawal, 29 C.F.R. § 2641.3(c). Additionally, the PBGC-mandated procedures provide for prehearing discovery; the presentation of a wide array of evidence; maintaining a record and transcript of the proceedings; submission of written briefs; calling of witnesses, including expert witnesses; preparation of written findings of fact and conclusions of law by the arbitrator; and reopening the proceedings. 29 C.F.R. § 2641.

In addition to its promulgated arbitration rules, the PBGC has formally approved alternative procedures sponsored by the International Foundation of Employee Benefit Plans and administered by the American Arbitration Association ("AAA"). These AAA rules have been used by multiemployer plan trustees and withdrawing employers since their initial formulation and publication in June 1981. Like the PBGC procedures, they are comprehensive and ensure complete arbitral fairness and impartiality.[*]

As this Court repeatedly has recognized, there is a presumption that an adjudicator is unbiased and "the burden of establishing a disqualifying interest rests on the party making the assertion." *Schweiker v. McClure*, 456 U.S. at 196. At no time in the court below or in any other reported judicial proceedings addressing the pending issue has there ever been a suggestion that the procedure for the selection of the arbitrator or the rules governing the conduct of the arbitration proceedings are unfair.

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[*] For example, Section 11 of the Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes provides that the AAA shall submit a list of proposed expert arbitrators to each party, and each party shall then engage in a numerical ordering of arbitrator preference, which is designed to result in an acceptable mutual choice. If the parties cannot agree on any proposed arbitrator, the AAA shall make the choice. Other provisions of these Rules are consistent with the PBGC-promulgated procedures.

A fundamental part of due process requires that no person will be deprived of his/her right to "a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). Yet, there has been no showing of arbitral predisposition in this case. The situation here is unlike *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), *Tumey v. Ohio*, 273 U.S. 510 (1927), or *Gibson v. Berryhill*, 411 U.S. 564 (1973), where the adjudicators had a clear interest in the outcome of the dispute. No attack has been made, in this or any other MPPAA case, on the impartiality or fairness of the arbitrator, the statutory and PBGC-promulgated arbitration procedures, or the judicial review of the arbitration.

The arbitrator selection process, the arbitration procedures mandated and approved by the PBGC, and the availability of federal court review of arbitration decisions are fully consistent with this Court's "powerful and independent constitutional interest in fair adjudicative procedure." *Jerrico*, 446 U.S. at 243.

B. The Rebuttable Presumption Of Correctness Applicable To Withdrawal Liability Determinations Made By Plan Trustees Is A Rational Congressional Response To Promote The Financial Stability Of Multiemployer Plans.

To correct the constitutional flaw of what it perceived to be a systemic bias, the *Yahn* court struck down the rebuttable presumption that the trustees' withdrawal liability determination is correct, 29 U.S.C. § 1401(a)(3)(A). In so doing, the court below ignored the numerous opinions of this Court upholding the constitutionality of statutory presumptions.

Given the Congressionally articulated need to preserve multiemployer pension plans and safeguard their solvency, *Connolly*, 89 L.Ed.2d at 180-81, and the Congressional intent to impose liability "only to the extent necessary to achieve the legislative purpose," *Nachman Corp. v. PBGC*, 592 F.2d 947, 962 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980), "it is not irrational for Congress to impose presumptions as a disincentive to challenging the trustees' determination precisely because . . . there is a range of 'reasonable' withdrawal liability amounts." *Keith Fulton*, 762 F.2d at 1143. And, when Congress creates a statutory right—*e.g.*, a plan's claim for withdrawal liability—Congress "clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof . . ." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982).

This Court long ago acknowledged that "[t]he law of evidence is full of presumptions either of fact or law." *Mobile, J. & K.C.R. Co. v. Turnipseed*, 219 U.S. 35, 42 (1910). Further, this Court has consistently held that due process is not jeopardized if there is a "rational connection between the fact proved and the ultimate fact presumed" and that

> [i]f a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.

Id. at 43.

In the instant case, the "facts proved" compromise the application of the rules for withdrawal liability determination set forth in ERISA at 29 U.S.C. §§ 1381 through 1399. The "fact presumed" is that trustees correctly apply these withdrawal liability rules to calculate the amount of liability. The rational basis for the presumption was articulated by the Senate Committee on Labor and Human Resources:

> The Committee includes the presumption to reduce the likelihood of dispute and delay over technical actuarial matters with respect to which there are often several equally 'correct' approaches. Without such a presumption, a plan would be helpless to resist dilatory tactics by a withdrawing employer—tactics that could, and could be intended to, result in prohibitive collection costs to the plan.

Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., *S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* 20-21 (1980).[9] Even the *Yahn* court could "not deny the *Keith Fulton* court's view that the presumptions are [a] rational means of promoting uniformity and discouraging litigation." *Yahn*, 787 F.2d at 141. *See Keith Fulton*, 762 F.2d at 1144-45.

Furthermore, under MPPAA the presumption of correctness is rebuttable. The provision in question does "little more than allocate the burden of proof to the challenger and direct that issues which are close be resolved in favor of" the plan trustees. *Republic Industries*, 718 F.2d at 641. As one arbitrator put it, in resolving a withdrawal liability dispute, the presumption should be intepreted as a device "to avoid procedural process problems." *Eberhard Foods, Inc. and RSEU Joint Pension Fund*, 6 Employee Benefits Cas. (BNA) 1961, 1966 (1985) (Glover, Arb.). The presumption is not to be viewed as "a 'per se' rule in favor of the Fund" or an "impenetrable 'safe harbor' . . . ." *Id.* Moreover, as a practical matter, arbitrators have not hesitated to rule that trustee withdrawal liability determinations have been unreasonable or erroneous. Indeed, in fifteen of the thirty-two reported MPPAA withdrawal liability arbitration cases, employers have successfully rebutted the presumptions, and arbitrators have, consequently, reversed or substantially modified trustee determinations.[10]

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[9] *See* H.R. Rep. No. 96-869, 96th Cong., 2d Sess. 86 (1980):

> These rules are necessary in order to ensure the enforceability of employer liability. In the absence of these presumptions, employers could effectively nullify their obligations by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination.

MPPAA, too, expressly authorizes the federal district courts "to enforce, vacate, or modify the arbitrator's award," 29 U.S.C. § 1401(b)(2), thereby affording the parties to the dispute an additional layer of impartial review. While MPPAA requires that in any district court proceeding there shall be a presumption that the

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[10] *Dart & Kraft, Inc. and Trustees of IAM National Pension Fund*, 7 Employee Benefits Cas. (BNA) 2226 (1986) (Nagle, Arb.); *Mangan and Owens Truckmen, Inc.*, 7 Employee Benefits Cas. (BNA) 1353 (1986) (Schwartz, Arb.); *PMTA-ILA Pension Fund and E.W. Coslett & Sons, Inc.*, 6 Employee Benefits Cas. (BNA) 2705 (1985) (Jaffee, Arb.); *Dravo Corp. and IAM National Pension Fund*, 6 Employee Benefits Cas. (BNA) 2641 (1985) (Mittelman, Arb.); *Paperworkers Local 286 Pension Plan and Kardon Industries*, 6 Employee Benefits Cas. (BNA) 2398 (1985) (Nagle, Arb.); *Buy-Low, Inc. and Trustees, Food Workers Pension Fund*, 5 Employee Benefits Cas. (BNA) 2641 (1984) (Bowles, Arb.); *Palmer Coking Coal Co. and United Mine Workers 1950 and 1974 Pension Plans*, 5 Employee Benefits Cas. (BNA) 2369 (1984) (Gordon, Arb.); *Steel Weldments Division and Trustees of Iron Workers Local 473 Pension Trust*, 5 Employee Benefits Cas. (BNA) 1596 (1984) (Dreyer, Arb.); *Classic Coal Corp. and United Mine Workers 1950 and 1974 Pension Plans*, 5 Employee Benefits Cas. (BNA) 1449 (1984) (Nagle, Arb.); *Continental, Inc. and Bakery Workers Pension Fund*, 5 Employee Benefits Cas. (BNA) 1326 (1984) (Mittelman, Arb.); *ITU Pension Plan and Ft. Worth Star Telegram*, 5 Employee Benefits Cas. (BNA) 1193 (1984) (Mittelman, Arb.); *Perkins Trucking Co. and Local 807 Pension Fund*, 4 Employee Benefits Cas. (BNA) 1489 (1983) (O'Loughlin, Arb.); *Terson Co., Inc. and Bakery Drivers Local 734 Pension Funds*, 4 Employee Benefits Cas. (BNA) 1009 (1983) (Graham, Arb.); *Herman Segall, Inc. and ILGWU Retirement Fund*, 3 Employee Benefits Cas. (BNA) 2449 (1982) (Pillsbury, Arb.); *Woodward Sand Co. and Operating Engineers Pension Fund*, 3 Employee Benefits Cas. (BNA) 2351 (1982) (Kaufman, Arb.).

arbitrator's findings of fact are correct, 29 U.S.C. § 1401(c), the presumption is rebuttable and "the statute before us deprives the trial judge of none of his normal judicial powers." *U.S. v. Gainey*, 380 U.S. 63, 68 (1965).

This Court has consistently upheld statutory presumptions favoring one side of a dispute over the other. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), not only were certain rebuttable presumptions upheld in favor of coal miners seeking compensation for their suffering from black lung disease, but the Court ratified the constitutionality—on procedural due process grounds—of two irrebuttable presumptions. In *U.S. v. Gainey*, the Court upheld a statutory presumption that the mere presence of a defendant at the site of an illegal liquor still is deemed sufficient evidence to authorize conviction for certain felonies in connection with the operation of illegal distilleries.

In *Weinberger v. Salfi*, 422 U.S. 749 (1975), the Court upheld an irrebuttable statutory presumption that precluded surviving wives and stepchildren from receiving certain Social Security benefits based on a marriage relationship with a deceased wage earner, if the duration of the marital relationship was for less than nine months. The Court in *Weinberger* stated that a prophylactic rule was acceptable, if there were a rational public policy underlying the Congressional determination. In view of this Court's holdings in such cases as these, there is simply no basis for finding that procedural due process is violated by the statutory presumption in MPPAA.[11]

"It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The totality of the withdrawal liability assessment process from the initial determination by the plan trustees, through the arbitral dispute resolution process to the final review by the federal courts is rational, impartial and fair. The rebuttable presumption of correctness, accorded the initial trustee determination, in no manner precludes any party to the dispute from a full hearing by neutral adjudicators, for the arbitrator and the courts are not deprived of any authority to reverse or modify the determination by the plan trustees.

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[11] We note that presumptions are perforce given to non-neutral parties—whether the presumption is given to a railway employee's widow seeking recompense from the railroad (*Turnipseed*) or to the Social Security Administration seeking to minimize the amount of the public fisc that is payable to a widow (*Salfi*).

CONCLUSION

For the foregoing reasons, the NCCMP respectfully urges this Court to reverse the decision of the court of appeals in this case.

Respectfully submitted,

GERALD M. FEDER *
DAVID R. LEVIN
NIK B. EDES
FEDER & ASSOCIATES
1527 18th Street, N.W.
Washington, D.C. 20036
(202) 387-1515
Attorneys for National Coordinating Committee for Multiemployer Plans

* Counsel of Record

Of Counsel:
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

CONNERTON & BERNSTEIN
1899 L Street, N.W.
Washington, D.C. 20036
(202) 466-6792

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AMICUS CURIAE

BRIEF

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Nos. 86-231, 86-253

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,
v.
YAHN & MCDONNELL, INC., and
THE PENNSTAR COMPANY, *et al.*,
Appellees.

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN, *et al.*,
Appellants,
v.
YAHN & MCDONNELL, INC., and
THE PENNSTAR COMPANY, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE APPELLEES

STEPHEN A. BOKAT
Counsel of Record
ROBIN S. CONRAD
PAULA J. CONNELLY
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the Amicus Curiae
Chamber of Commerce of the
United States

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**On Appeal from the United States Court of Appeals
for the Third Circuit**

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE APPELLEES

STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States ("Chamber") is the nation's largest federation of businesses, with a membership consisting of more than 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. An important aspect of the Chamber's activities is presenting its members' views on business issues before all branches of the federal government. In this capacity, the Chamber has participated as *amicus curiae* in a wide spectrum of legal challenges to laws which impose unconstitutional or onerous restrictions on businesses.[2]

The withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act at issue in this case impose restrictions on businesses which are both unconstitutional and onerous. Under the Act, any employer that withdraws from a multiemployer pension plan must pay to the plan a proportional share of its unfunded vested benefits. This withdrawal liability is computed and collected by the plan trustees, a group of officials who are responsible for managing the plan. The Act also makes these trustees the statutory guardians of plan assets, and charges them with a strict fiduciary duty to act for the exclusive purpose of providing benefits to plan participants. Section 104(2) of the Act, the provision at issue before the Court, further provides that

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[1] This brief is being filed with the consent of the parties, pursuant to Supreme Court Rule 36.2. The consent letters have been filed with the Clerk of the Court.

[2] *See, e.g., California Federal Savings & Loan Ass'n* v. *Guerra*, 107 S. Ct. 683 (1987); *Fort Halifax Packing Co.* v. *Coyne*, 510 A.2d 1054 (Me. 1986), *prob. juris. noted*, 107 S. Ct. 430 (U.S. Nov. 10, 1986) (No. 86-341); *Wisconsin Dept. of Labor & Industry* v. *Gould*, 106 S. Ct. 1057 (1986); *TWA* v. *Thurston*, 469 U.S. 111 (1985); *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984); *Chamber of Commerce of the U.S.* v. *State of New Jersey*, 89 N.J. 131, 445 A.2d 353 (1982).

trustees' assessments of withdrawal liability are *presumed correct* in any subsequent arbitral challenge.[3]

This Court has recognized that the fifth amendment principle that no person shall be deprived of property without due process of law includes a guarantee that the presiding tribunal will be impartial. While pension plan trustees act as a tribunal for withdrawing employers, they hardly constitute an impartial tribunal. Trustees have an "innate taint of partiality"[4] against withdrawing employers resulting from their statutory combination of asset-guarding and penalty-assessing responsibilities. Beyond subjecting withdrawing employers to the assessment of this biased tribunal, the MPPAA imposes on the employer the burden of overcoming a statutory presumption that the assessment is correct. The Chamber submits that adding this layer of armor to an already weighted assessment deprives the employer of the due process mandated by the fifth amendment.

The Chamber was—and is—a supporter of the MPPAA's goals. It is in the interest of companies remaining in multiemployer plans and their employees that withdrawing companies pay their proportional share of the plan's unfunded vested benefits. However, the statutory presumption of correctness denies withdrawing employers any meaningful opportunity to obtain a fair calculation of this liability. *De novo* review by an impartial decision maker—the arbitrator—will guarantee withdrawing employers such a fair calculation. Given the large sums of withdrawal liability often assessed, this safeguard will mean the difference between staying in business and bankruptcy for some withdrawing employers. It also may quell the fears of companies currently reluctant to join multiemployer plans because of the perceived danger of immense and unchallengeable withdrawal liability assessments.

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[3] Section 104(2), 29 U.S.C. § 1401(a)(3)(A), provides that "any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous."

[4] *See Keith Fulton & Sons, Inc.* v. *New England Teamsters & Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137, 1142 (1st Cir. 1985) (en banc), *quoting Dorn's Transportation, Inc.* v. *IAM Nat'l Pension Fund*, 578 F. Supp. 1222, 1237-38 (D.D.C. 1984), *aff'd mem.*, 753 F.2d 166 (D.C. Cir. 1985).

Because the Chamber is uniquely situated to present to the Court the broad business perspective on this important issue, it submits this brief, and urges the Court to affirm the decision of the Third Circuit below.

ARGUMENT

I. PRESUMING THE ASSESSMENTS OF A BIASED TRIBUNAL TO BE CORRECT VIOLATES THE FIFTH AMENDMENT GUARANTEE OF PROCEDURAL DUE PROCESS.

The fifth amendment precept that no person shall be deprived of property without due process of law includes the guarantee of an "impartial and disinterested tribunal," in furtherance of the "powerful . . . constitutional interest in fair adjudicative procedure."[5] The assessment scheme of the Multiemployer Pension Plan Amendments Act ("MPPAA") denies this right to employers who withdraw from multiemployer plans. Empowering trustees, inherently biased decision makers, with great latitude in computing withdrawal liability, and then imposing the burden on employers to prove the assessment unreasonable, deprives employers of any meaningful opportunity to obtain a fair calculation of their liability. As described by Judge Bailey Aldrich, an employer withdrawing from a multiemployer pension plan:

> finds himself, without possibility of relief, in a boxing ring from which he had been told he might be exempt, the prize being his own money, in an uneven match, but assured by the referee that he would see to it that it was a fair fight.[6]

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[5] *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980).

The Chamber recognizes that trustees are best equipped to make an initial determination of withdrawal liability, given their knowledge of the plan's history, its current provisions, and its likely future provisions. It may indeed have been "entirely reasonable"[7] for Congress to delegate this task to trustees, despite their inherent bias. However, presuming trustees' assessments to be correct and stripping the arbitrator of any substantive power to review their subjective determinations removes the only protection available to safeguard employers' due process rights. Only by striking down the presumption of correctness can this Court ensure that an impartial decision maker, the arbitrator, will afford employers the meaningful review of their withdrawal liability assessments that the fifth amendment requires.

A. Trustees Function as a Tribunal, Exercising Significant Discretion in Assessing Withdrawal Liability.

Contrary to the assertions of the Pension Benefit Guaranty Corporation ("PBGC") and the United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan ("Plan"),[8] trustees of multiemployer pension plans are decision makers who are intimately involved in the process of assessing withdrawal liability. Trustees make numerous adjudicative decisions, both in determining whether a variety of statutory exceptions apply to reduce the amount of liability, and in choosing the various actuarial assumptions and underlying data to be used in the calculations. References to trustees' limitations under "detailed and explicit statutory guides"[9] and "precis[e] . . . Congressionally-prescribed standards"[10] simply ignore trustees' broad latitude in the assessment process and the reality that trustees' decisions may increase or decrease liability by thousands of dollars, or eliminate it altogether. Far from performing a mechanical task of inserting predetermined numbers into a fixed formula, trustees are deeply involved in all aspects of the assessment process, and have vast power in determining the final liability figure.

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[6] *Keith Fulton & Sons*, 762 F.2d at 1146 (Aldrich, J., dissenting).

[7] See PBGC brief at 30.

[8] PBGC brief at 34-41; Plan brief at 23-27.

1. *Trustees influence the choice of actuarial assumptions and the projection of underlying data.*

One way trustees influence withdrawal liability calculations is in the selection of actuarial assumptions. Technically, the assumptions and methods chosen represent the best judgment of plan actuaries, who are professional advisors to trustees in plan management and liability calculations. Indeed, the Act requires that the assumptions and methods used be "reasonable (taking into account the experience of the plan and reasonable expectations)," and, "in combination, offer the actuary's best estimate of anticipated experience under the plan."[11] However, an actuary's "best estimate of anticipated experience under the plan" clearly can be influenced by trustees' judgments in these areas. Indeed, the PBGC itself has recognized trustees' power in this area, stating: "[trustees] shall *approve* the actuarial assumptions upon which the plan's liabilities are calculated, including assumptions relating to mortality, interest, turnover, and administrative expenses."[12] Trustees' evaluation of a number of

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[9] PBGC brief at 34, *quoting Keith Fulton & Sons*, 762 F.2d at 1141, *quoting Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 725 F.2d 843, 855 (2d Cir. 1984).

[10] PBGC brief at 35, *quoting Dorn's Transportation, Inc.* v. *IAM Nat'l Pension Fund*, 578 F. Supp. at 1237-38.

[11] 29 U.S.C. § 1393(a)(1).

[12] 48 Fed. Reg. 31,252 (1983) (proposed rule) (emphasis added). In addition, the American Academy of Actuaries recommends that

subjective variables[13] thus is a critical factor in the assessment process, and has a pronounced effect on the amount ultimately assessed.[14] The statutory standards of "reasonableness" and "best estimate" leave trustees great latitude in the selection of assumptions and methods, and actuaries may utilize methods that comport with trustees' judgments without breaching their duties in any way.[15]

Moreover, when a fund's information on beneficiaries is incomplete, the gap must be filled by assumptions or projections. Data must be selected to use as the basis

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the actuary "take into account, to the extent he deems suitable, general or specific information available from other sources, including the plan sponsor, plan administrator, investment managers, accountants, economists, etc." American Academy of Actuaries, *1987 Yearbook*, Pension Plan Recommendations & Interpretations, Recommendation A, § 6.7 at 359. The Academy recognizes that "[a]s a result of these considerations, the actuary may develop actuarial assumptions that differ from plan to plan . . . ." *Id.*

[13] In addition to the variables noted by the PBGC, these assumptions may involve evaluation of the health of an industry, future levels of employment (including workforce needs, average hours to be worked, disability rates, salary projections), retirement age of employees, percentage of employees that will become vested, valuation of plan assets, future rate of return on plan assets, and funding assumptions (how much money must be contributed in the present year to meet the ongoing needs of the plan).

[14] *See, e.g., Transport Motor Express, Inc.* v. *Central States, Southeast & Southwest Areas Pension Fund*, 724 F.2d 575, 576-77 (7th Cir. 1983) ("Apparently the trustees of the Central States Fund considered three different actuarial estimates of unfunded vested benefits ranging from $2.047 billion to $4.108 billion before settling on the figure of $3.576 billion that provided the basis for the claims assessed against the withdrawing companies.").

[15] PBGC's undisputed assertion that "an enrolled actuary may have his enrollment suspended or terminated if he 'has failed to discharge his duties under [ERISA]'" (PBGC brief at 36 n.27, citing 29 U.S.C. § 1242(b)(1)) ignores the fact that an actuary's conclusion that assumptions favored by trustees are reasonable does not in any way constitute a failure by the actuary to discharge his duties.

for analysis, and statistical methods chosen to apply to them.[16] These assumptions can have a considerable effect on actuarial valuations. One GAO study concluded that the lack of complete participant data is "causing liabilities and costs of some plans to be under- or over-stated by millions of dollars." [17]

Thus, it is clear that trustees' decisions have a tremendous effect on the amount of withdrawal liability ultimately assessed, and their role is far from ministerial.

2. *Trustees rule on the applicability of statutory exceptions.*

The MPPAA's presumption of correctness applies to much more than withdrawal liability calculations. Section 104(2) provides that *any* determination trustees make under sections 1381 through 1399 and section 1405 are presumed correct.[18] As more fully detailed in the Appellees' brief,[19] these 20 sections of the Act charge trustees with making a variety of difficult and subjective determinations that have a profound effect on withdrawal liability. For example, trustees must determine whether and on what date an employer "permanently cease[d]" to have an obligation to contribute to the plan; whether

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[16] These data may include the number of covered employees and other beneficiaries, the number of vested employees, and the length of employees' credited service. While PBGC disputes that assessing withdrawal liability involves "case-specific, fact-bound adjudications" (PBGC brief at 28), it is difficult to imagine determinations more case-specific or fact-bound than these.

[17] *See* Comptroller General's Report to the Congress: *Incomplete Participant Data Affect Reliability of Values Placed by Actuaries on Multiemployer Pension Plans*, GAO/HRD-84-38 (1984) (cover). In one plan, when the previously missing birthdates for 12,000 participants were obtained, the actuarial liability increased by about 46 million dollars. *Id.* at iii.

[18] 29 U.S.C. § 1401(a)(3)(A).

[19] See Brief of Appellees at 21-22.

and when a company "permanently cease[d] all covered operations"; whether any of the specialized industry provisions apply; whether a "bona fide, arm's-length sale of assets to an unrelated party" occurred; and whether there was a "labor dispute." Each of these determinations contains subjective elements; for example: has the company's obligation to contribute *permanently* ceased? *When* did it cease? [20] Was the sale of assets *bona fide*? Was the sale conducted at "*arm's length*?"

PBGC contends that the applicability of many of these provisions is a matter of legal interpretation, as opposed to factual determination. It argues that since trustees' legal interpretations are not entitled to the presumption of correctness, their discretion in ruling on statutory exceptions already is tempered by *de novo* arbitral review.[21] This simply is not the case. First, as PBGC acknowledges,[22] only the preamble to a proposed rule [23] exempted legal determinations from the presumption of correctness; in its final rule, PBGC declined to "discuss the force and effect of the statutory presumptions." [24] Secondly, despite the possible distinction, many of trustees' determinations are factual, or contain both factual and legal elements. The arbitrator may not choose to divide trustees' rulings into legal conclusions and factual conclusions;[25] and even if the arbitrator does so, presuming trustees' "factual" rulings to be correct in this tremendously subjective area raises severe due process concerns.

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[20] *See, e.g., Transport Motor Express, Inc.* v. *Central States, Southeast & Southwest Areas Pension Fund*, 724 F.2d at 578-79 ("it is unclear whether the continued employment of a small number of employees engaged in closing a business would delay the 'cessation of covered activities' beyond the date when the bulk of an employer's operations are terminated"); *NLRB* v. *Cauthorne*, 691 F.2d 1023, 1026 (D.C. Cir. 1982) (the parties may have reached a bargaining impasse in 1979, cutting off the employer's obligation to contribute).

[21] *See* PBGC brief at 39-40.

[22] PBGC brief at 40 and n.33.

[23] 48 Fed. Reg. 31,253 (1983).

[24] 50 Fed. Reg. 34,681 (1985).

In sum, the portrayal of withdrawal liability assessment as a non-adjudicative, "essentially legislative task"[26] in which trustees exercise an "extremely limited and circumscribed" degree of discretion[27] is unrealistic and inaccurate. Under the current statutory scheme, trustees are the decision makers, and reviewing arbitrators have extremely limited and circumscribed power. This Court should affirm the Third Circuit's decision striking down the presumption of correctness, so that employers will have an opportunity to obtain meaningful review of their withdrawal liability by truly impartial decision makers: arbitrators.

B. Trustees are Inherently Biased Against Withdrawing Employers.

"Impartial" is defined as "treating or affecting all equally."[28] Trustees, who owe a strict fiduciary duty to the fund and its beneficiaries, and no duty at all to withdrawing employers, cannot treat the interests and needs of both "equally." In fact, actuaries and plan officials participating in a 1985 GAO study cited as one of the reasons low interest rate assumptions were used for calculating withdrawal liability the fact that "[*t*]*rustees wanted to maximize the liability to withdrawing employers*."[29] Congress specifically recognized this likelihood, stating:

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[25] *See* 29 C.F.R. § 2641.7(a)(1) (1986) (the arbitrator need not explicitly designate his findings of fact and conclusions of law as such).

[26] PBGC brief at 28.

[27] *Id.* at 34.

[28] *Webster's New Collegiate Dictionary* (1977) at 574.

[29] Comptroller General's Report to the Congress: *Effects of Liabilities Assessed Employers Withdrawing from Multiemployer Pension Plans*, GAO/HRD-85-16 (1985) at 26 (emphasis added).

> It is *expected* that plan trustees will need to make practical collection decisions which are consistent with their fiduciary duties and characteristic of any responsible creditor concerned with *maximizing the total ultimate recovery* at supportable costs.[30]

As the Third Circuit below observed, the possibility that trustees may not assess excessively high withdrawal liability for fear of discouraging future participation "does not mean the trustees are less biased, only that their manifest bias will not always result in gross injustice to employers."[31] The Chamber submits that the fact that there is a *possibility* that trustee bias will not result in injustice in a particular case does not rescue the MPPAA's scheme or make it "fair enough."[32]

II. THE EXISTING SCHEME IMPOSES AN ONEROUS BURDEN ON EMPLOYERS.

Employers may incur vast withdrawal liability debts, even if they make all required contributions before withdrawing. Horror stories abound of companies that withdraw from multiemployer plans or are forced into technical withdrawal by a labor dispute or union decertification election, then are assessed huge sums in withdrawal liability, sometimes more than the net worth of the company.[33] The enormity of this burden is compounded by the fact that § 104(2)'s presumption of correctness leaves little chance of successfully challenging the assessment.

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[30] 126 Cong. Rec. 23,288 (Aug. 26, 1980) (statement of Senators Williams and Javits) (emphasis added).

[31] 787 F.2d at 139.

[32] *See Keith Fulton & Sons*, 762 F.2d at 1140.

[33] *See Multiemployer Pension Plan Stabilization Act of 1981: Hearings before the Senate Subcommittee on Labor of the Committee on Labor and Human Resources*, 97th Cong., 2d Sess. 23 (1981) (statement of Hugh C. Shurtleff, president of Time-DC, Lubbock, Texas) ("Our liability is computed at about $30 million. Our net worth presently is between $16 and $17 million."); *id.* at 552-553 (testimony of Jay Stone, co-owner of Naman Rainwear Co., New York, New York) (withdrawal liability computed at $615,000, company's net worth $600,000); *id.* at 563 (testimony of

Trustees' *prima facie* case is established as soon as they mail a claim to the employer. The company must begin to pay at once, and must meet an affirmative burden to prove that the claim is unreasonable. Thus, the contention that trustees are "merely litigants," whose withdrawal liability assessment "simply represents the plan's claim, much like a civil complaint,"[34] is farfetched. A civil complainant bears the burden of proving entitlement to a money judgment before an impartial tribunal. Trustees bear no such burden. Nor are trustees "simply part of an administrative procedure . . . for reaching an initial determination of withdrawal liability . . . ."[35] Trustees' "initial determination" is the *final* determination unless the employer can prove it unreasonable. Thus, the characterization of employers' burden as "nothing more than . . . proving the initial withdrawal liability assessment incorrect or contrary to law"[36] proves too much; even phrased this way, this burden is too onerous to meet the fifth amendment's mandate.

Alan Lubell, president of Sandy Shaw, Inc., New York, New York) ("[O]ur withdrawal liability under MEPPA is approximately equal to our net worth [$1,300,000]").

A statement by Howard Ryder, president of Coastal Tank Lines, Akron, Ohio, is particularly telling: "We estimate that if total withdrawal liabilities are recognized, the entire unionized trucking industry will have a *negative net worth.*" *Id.* at 15 (emphasis added).

[34] Brief of the Trustees of the United Mine Workers of America 1950 and 1974 Pension Plans as Amici Curiae ("Trustees") at 18.

[35] Trustees' brief at 16, *quoting Keith Fulton & Sons*, 762 F.2d at 1140.

[36] Trustees' brief at 19.

III. INVALIDATING THE PRESUMPTION OF CORRECTNESS WILL NOT OPEN THE FLOODGATES, AND EVEN IF IT WILL, THE COURT MUST STRIKE DOWN UNCONSTITUTIONAL PROVISIONS.

The role of arbitrators will not change drastically if the presumption is struck down. Arbitrators presiding over withdrawal liability challenges already perform an unusual function. The typical labor arbitrator interprets the terms of a contract, using a knowledge of the practices of the industry in general and the shop in particular, and considering the effect of a particular outcome on the future working relationship of the parties.

By contrast, an MPPAA arbitrator does not interpret the intentions of the parties as expressed in plan documents. Rather, he reviews an employer's challenge to a withdrawal liability assessment, and determines whether the employer has overcome the presumption of correctness and proved the assessment unreasonable. This determination requires a knowledge of federal pension law, pension funding theories, pension plan practices, and actuarial concepts. In sum, the role of the MPPAA arbitrator is "similar to that of a judge applying applicable law to the facts presented, and not a mediator attempting to reconcile competing interests."[37]

The MPPAA arbitrator's role would not change appreciably if the presumption were omitted. The arbitrator still would rule on whether the withdrawal liability assessment was reasonable in a given case; the burden simply would be on the trustees to prove reasonableness, rather than on the employer to prove unreasonableness.[38]

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[37] 126 Cong. Rec. 23,039 (Aug. 25, 1980) (Rep. Thompson).

[38] As one arbitrator recently stated in overturning a withdrawal liability assessment, "If de novo review is required/permitted, I would have arrived at the same valuation . . . ." *Casablanca Industries, Inc.* v. *UFCW Local 23-Giant Eagle Pension Fund*, 7 Empl. Ben. Cas. 2705, 2723 (1986) (Jaffe, Arb.).

This would not entail a "'futil[e]' . . . search for the 'correct' actuarial assumptions";[39] rather, an impartial review of the *reasonableness* of the assumptions and methods used.

Even if the fears of extended arbitration proceedings are justified, this Court should invalidate § 104(2) because it is unconstitutional. The fact that it may serve a "litigation-dampening" purpose[40] does not temper its invalidity.

CONCLUSION

Section 104(2) currently imposes an onerous and unconstitutional burden on employers withdrawing from multiemployer plans. This Court should affirm the decision of the Third Circuit below and invalidate this provision to remove the burden and encourage continued participation in multiemployer pension plans.

Respectfully submitted,

STEPHEN A. BOKAT
Counsel of Record
ROBIN S. CONRAD
PAULA J. CONNELLY
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the Amicus Curiae
Chamber of Commerce of the
United States

March 9, 1987

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[39] PBGC brief at 43 (citations omitted).

[40] PBGC brief at 44.

AMICUS CURIAE

BRIEF

No. 86-231 (9)
No. 86-253 (6)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PENSION BENEFIT GUARANTY CORPORATION

and

UNITED RETAIL & WHOLESALE EMPLOYEES UNION
LOCAL NO. 115 PENSION PLAN, *et al.*,
Appellants,

v.

YAHN & MCDONNELL, INC., *et al.*,
Appellees.

ON APPEALS FROM THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE FLYING TIGER LINE INC., ET AL., AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N.Y. 10005
(212) 422-3000

RICHARDS, LAYTON & FINGER
One Rodney Square
Wilmington, Delaware 19899
(302) 658-6541

ROBERT J. HARTER, JR.
Tiger International, Inc.
LAWRENCE M. NAGIN
The Flying Tiger Line Inc.
7401 World Way West
Los Angeles, California 90009
(213) 646-6161

Of Counsel

DOUGLAS D. BROADWATER
(*Counsel of Record*)
RICHARD LIEBESKIND, JR.
DONNA M. DESILVA
One Chase Manhattan Plaza
New York, N.Y. 10005
(212) 422-3000

R. FRANKLIN BALOTTI
JESSE A. FINKELSTEIN
WILLIAM W. BOWSER
One Rodney Square
Wilmington, Delaware 19899
(302) 658-6541

Attorneys for The Flying Tiger Line Inc., et al., as amici curiae in support of affirmance

March 9, 1987

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-231
No. 86-253

PENSION BENEFIT GUARANTY CORPORATION

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v.

YAHN & MCDONNELL, INC., *et al.*,
Appellees.

ON APPEALS FROM THE UNITED STATES
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BRIEF OF THE FLYING TIGER LINE INC., ET AL., AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

INTEREST OF AMICI CURIAE

The Flying Tiger Line Inc., the world's largest all-freight airline, is the principal operating subsidiary of Tiger International, Inc., a publicly traded corporation which has also owned other trucking and freight companies.[1] Tiger submits this brief *amici curiae* in support of affirmance because it has a particular interest in the outcome of this proceeding. If this Court reverses the decision below, which held unconstitutional the presumption in arbitration that certain withdrawal liability determinations of multiemployer pension plan trustees are correct unless "unreasonable or clearly erroneous", 29 U.S.C. § 1401(a)(3)(A), a group of such plans will claim that Tiger must disprove as clearly erroneous their trustees' assertions that Tiger is a member of an "employer" control group jointly liable for approximately $36 million in withdrawal liability claims under the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381 *et seq.* ("MPPAA"). This withdrawal liability was allegedly incurred by Hall's Motor Transit Co. ("Hall's"), a former Tiger subsidiary, more than a year after Tiger had sold that subsidiary.

In 1980 Tiger purchased Hall's, an interstate trucking company founded in 1922. After the 1980 deregulation of interstate trucking, Hall's incurred substantial operating losses and by 1984 adverse financial developments in Tiger's other businesses effectively prohibited Tiger from advancing any additional financing to Hall's. After months of discussions with potential buyers and lenders, in January 1985 Tiger sold seventy-five percent of the Hall's stock to an unrelated company wholly owned by Hall's then-chief financial officer. Following the sale, Hall's was able to obtain significant wage concessions from its Teamster employees in return for an Employee Stock Ownership Plan and substantial additional financing from third-party lenders. Hall's operations and contributions to its many MPPAA pension plans continued until March 1986, when Hall's filed a voluntary petition for reorganization in the U.S. Bankruptcy Court for the Middle District of Pennsylvania. By the time of Hall's petition and concurrent cutback in operations, Tiger had not had any participation in or control of Hall's management or operations for more than a year and had no equity interest in Hall's.

Since the Hall's reorganization filing, the Hall's plans have made more than $36 million in MPPAA withdrawal liability claims against Hall's. Several Hall's plans also asserted their trustees' view that Tiger could be claimed to be an "employer" subject to MPPAA and jointly liable with Hall's for any Hall's withdrawal liability notwithstanding Tiger's divestiture of Hall's. On July 3, 1986 Tiger commenced an action in federal district court against the plans that asserted withdrawal liability claims against Hall's, seeking declarations (1) that Tiger and its affiliates are not members of an "employer" control group, 29 U.S.C. § 1301(b), jointly liable for Hall's withdrawal liability and (2) that MPPAA, including 29 U.S.C. § 1401(a)(3)(A), is unconstitutional on its face and as applied to Tiger. *See IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 129 (3d Cir. 1986) (advising potential control group members to seek judicial declarations of their "employer" control group status).

The Hall's plans moved to dismiss. They argued that the "real" issue of Tiger's complaint arose from their trustees' prospective determinations that a principal purpose of Tiger's January 1985 sale of Hall's was to evade or avoid withdrawal liability, allowing these trustees to disregard that sale under 29 U.S.C. § 1392(c) and consider Tiger still within the Hall's "employer" control group liable for withdrawal liability subsequently incurred by Hall's. Tiger's purported "employer" status, described by the largest plan claimant as "essentially the equivalent of a fraud case" against Tiger, was claimed to be factual in nature and disputable by Tiger only under MPPAA procedures, particularly MPPAA arbitration.

On September 12, 1986 the district court ruled, *inter alia*, that it would hear and resolve the dispute on Tiger's "employer" status. *The Flying Tiger Line Inc. v. Central States, Southeast and Southwest Areas Pension Plan,* 7 E.B.C. 2385, 2390-91 (D. Del. 1986). The Hall's plans moved for reargument or a stay pending MPPAA arbitration. The Pension

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[1] The Flying Tiger Line Inc. is 99% owned by Tiger International, Inc., which also owns Warren Transport, Inc., a company engaged in specialized hauling. These three entities are referred to herein collectively as "Tiger".

Benefit Guaranty Corporation ("PBGC") filed a letter brief supporting the Hall's plans' motion to relegate any dispute on Tiger's "employer" status, including the plans' "evade or avoid" assertions, to MPPAA arbitration under 29 U.S.C. § 1401(a)(1). On October 17, 1986, the district court reversed its prior determination, concluded that prospective plan trustee determinations to disregard Tiger's sale of Hall's and treat Tiger as a jointly liable "employer" created a "need to develop a factual record" requiring MPPAA arbitration, and stayed Tiger's action pending such a MPPAA arbitration. 7 E.B.C. 2392, 2396-97 (D. Del. 1986). Tiger is appealing this decision to the U.S. Court of Appeals for the Third Circuit.[2] If unsuccessful on appeal, Tiger will be required to submit its claim not to be a MPPAA "employer" with Hall's to MPPAA trustee determination, review and arbitration before it can present that claim to a federal district court.

Shortly after the district court action was stayed, the Hall's plan with the largest withdrawal liability claim, Central States, Southeast and Southwest Areas Pension Plan ("Central States"), advised Tiger that its

> "Board of Trustees has determined that a principal purpose of the Hall's divestiture by [Tiger] was to avoid or evade withdrawal liability. Accordingly, the Board of Trustees has determined, pursuant to [29 U.S.C. § 1392(c)], that it must disregard that transaction and that [Tiger] is the employer responsible for Hall's withdrawal

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[2] Nos. 86-5817, 5931, 87-3063 (consolidated). On December 4, 1986 the district court, stating it found the issues discussed in its two opinions "extremely difficult", amended its October 17 order to provide for permissive appeal, 28 U.S.C. § 1292(b), and stayed all further proceedings pending completion of appellate review. Tiger's petition to appeal was granted by the Court of Appeals on January 9, 1987. It is Tiger's position on appeal that its "employer" status is a proper question for judicial, and not arbitral, determination; that the "employer" issue is not converted to one for mandatory arbitration by the plans' reliance on an "evade or avoid" assertion; that the plans have no legally adequate basis to claim that the Hall's divestiture can be disregarded as sham under 29 U.S.C. § 1392(c); that Section 1392(c) does not of itself give rise to MPPAA arbitral jurisdiction; and that mandatory arbitration of Tiger's "employer" status, the predicate to arbitral jurisdiction here, is contrary to federal law.

> liability. . . . The amount of $1,741,349.51 [of a total withdrawal liability assessment of $15,539,816.66] is now past due and payable immediately."

Central States indicated its trustees' determination was based on affidavits submitted in the Delaware litigation by its employees and by a lawyer for another Hall's plan. Shortly thereafter Central States demanded a MPPAA arbitration, purportedly pursuant to 29 U.S.C. § 1401(a)(1), "seek[ing] an award confirming the determination of the Board of Trustees" that Tiger is liable for the claimed withdrawal liability.

If Tiger is forced to arbitrate its "employer" status, a reversal by this Court in the instant case will prevent Tiger from receiving a procedurally fair resolution of the legal and factual issues assertedly implicated by the Hall's plans' claims that Tiger is an "employer" jointly liable with Hall's for Hall's withdrawal liability.

SUMMARY OF ARGUMENT

A party being deprived of property has a due process right to a decision by an unbiased decisionmaker. A scheme for resolving disputes about that deprivation that relies on biased decisionmakers incorporates a substantial likelihood of a biased and erroneous decision. That likelihood is not reduced and the denial of due process is not remedied if those biased decisions remain insulated from plenary review. Under MPPAA's dispute resolution procedures, biased plan trustees determine whether an employer has withdrawn and the amount of its resulting withdrawal liability, with challenge and review of their determinations in mandatory MPPAA arbitrations that are required to presume trustee determinations correct unless unreasonable or clearly erroneous. 29 U.S.C. § 1401(a)(3)(A) (the "Arbitral Presumption"). MPPAA does not provide for a resolution of withdrawal liability disputes by an impartial decisionmaker with full authority to consider the disputed issue *de novo* and plainly denies due process to alleged withdrawing employers.

In urging that the Third Circuit's decision be reversed, appellants assert that that court "seriously misapprehended the scope of discretion accorded to the trustees in determining withdrawal liability". PBGC Br. 18. Appellants insist that the trustee determinations insulated by the Arbitral Presumption are nondiscretionary, ministerial, "technical actuarial" or legislative, do not require historic fact-finding or weighing evidence and do not constitute case-by-case decisionmaking. Attempting to justify MPPAA's "stacked deck", appellants focus on plan selection of a method for calculating withdrawal liability and the resulting calculations and assert that these "determinations" are not "adjudications" and therefore due process does not require that they be made by a decisionmaker free from any bias or interest.

It is appellants' argument, not the decision below, that disregards the variety of case-specific determinations, including disputed factual determinations, that MPPAA plan trustees actually make in pursuing withdrawal liability claims. Elsewhere both plan trustees and the PBGC maintain that virtually any dispute with a plan's withdrawal liability determination and assessment is subject to challenge only within MPPAA's procedures for "reasonable" trustee review, arbitration constrained by the Arbitral Presumption and judicial review constrained by the similar presumption in 29 U.S.C. § 1401(c). The PBGC has urged federal courts and advised MPPAA plans that the MPPAA dispute procedures apply to a wide range of plan trustee determinations. Lower court decisions recognize that a MPPAA plan may, in addition to determining the amount of withdrawal liability, determine and then relegate to MPPAA dispute procedures issues of whether a withdrawal has occurred, the time and extent of that withdrawal and the applicability of statutory exclusions of certain events from liability-triggering withdrawals. Even if limited to the fact of withdrawal and calculation of the resulting withdrawal liability, those determinations are sufficiently case-specific and fact-based adjudications of property interests to be matters on which a purportedly liable employer is entitled to an unbiased decisionmaker. MPPAA's procedures nowhere provide or permit such an unbiased decision.

This Court's decisions recognize that even the appearance of bias or interest will disqualify a decisionmaker. Appellants' argument, that plan trustees are not necessarily compelled by their fiduciary duties to maximize withdrawal liability claims against every withdrawn employer, does not address or rebut the fact that plan trustees are free to be biased against withdrawn employers; owe fiduciary duties solely to the plans and not to employers; are unlikely to resist bias in favor of their plans; have clear incentives for bias against withdrawing employers; and have repeatedly demonstrated their bias against assertedly withdrawing employers in attempts to increase withdrawal liability receipts. Biased plan trustees making case-specific, discretionary (and assertedly factual) determinations of withdrawal liability plainly violate the Due Process clause of the Fifth Amendment, and seriously slanted MPPAA arbitral review does not constitute the *de novo* inquiry by an unbiased decisionmaker necessary to cure that denial of due process.

ARGUMENT

THE PRESUMPTIVE VALIDITY OF PLAN DETERMINATIONS MANDATED BY 29 U.S.C. § 1401(a)(3)(A) UNCONSTITUTIONALLY DEPRIVES EMPLOYERS OF THEIR DUE PROCESS RIGHT TO AN IMPARTIAL DECISIONMAKER.

It is a basic precept of due process that the process accorded a person threatened with a deprivation of life, liberty or property must include at a minimum an unbiased and disinterested decisionmaker. In *Tumey v. Ohio*, 273 U.S. 510 (1927), the Court traced this requirement as far back as fourteenth-century England, *id.* at 524, and concluded:

> "All questions of judicial qualification may not involve constitutional validity. . . . But it certainly violates the Fourteenth Amendment, and deprives a defendant in a

> criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." 273 U.S. at 523.

This "requirement of neutrality has been jealously guarded by this Court", *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); applies equally under the Fifth Amendment to federal procedures, *id.; Schweicker v. McClure*, 456 U.S. 188 (1982); governs civil administrative proceedings, *Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); and is infringed if the decisionmaker is an officer or agent of an entity with a pecuniary interest in the proceedings, even though that officer does not himself have a direct, personal, pecuniary interest in the proceedings. *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972). Proof of actual influence, bias or error in the challenged proceeding is not necessary to find a violation of this requirement of neutrality:

> "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. *Every procedure which would offer a possible temptation to the average man* as a judge to forget the burden of proof required to convict the defendant, or *which might lead him not to hold the balance nice, clear and true* between the State and the accused, denies the latter due process of law." *Tumey, supra*, 273 U.S. at 532 (emphasis added); *accord Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580, 1587 (1986).

Applying the principle of these cases, the Court of Appeals for the Third Circuit found that MPPAA's dispute procedures violate the Fifth Amendment insofar as they grant a presumption of correctness, reversible only if proven "unreasonable or clearly erroneous", to determinations by pension plan trustees who "have a natural interest and may even consider it a duty to maximize the fund by extracting as much money as possible

from withdrawing employers." J.S. App. 21a.[3] MPPAA dispute procedures have been urged and held to include review of case-specific adjudicatory determinations by trustees who have substantial temptation to reach biased results. Because MPPAA dispute procedures do not require or even permit *de novo* review of those determinations, this Court should affirm the decision below and hold that 29 U.S.C. § 1401(a)(3)(A) violates the Due Process Clause of the Fifth Amendment.

A. *MPPAA Trustee Determinations Are Not Limited by the Statute or in Practice to "Legislative", "Nonadjudicative" or "Nondiscretionary" Matters.*

Appellants' present arguments rely heavily on the opinion for the court in *Keith Fulton & Sons, Inc. v. New England Teamsters*, 762 F.2d 1137 (1st Cir. 1985) (en banc), and Chief Judge Seitz's dissent in the case now on review. J.S. App. 35a-40a. Both these opinions proceed from the mistaken premise that MPPAA plan trustees make only ministerial or nonadjudicative decisions, primarily calculations, and lack the discretion necessary for them unfairly to assess withdrawal liability against a withdrawn employer:

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[3] Contrary opinions in other courts of appeals have relied on a narrow reading of the scope of "determinations" subject to the Arbitral Presumption. *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Indus. Pension Fund*, 762 F.2d 1137, 1140 (1st Cir. 1985) (en banc); *Board of Trustees of the Western Conf. of Teamsters Pension Fund v. Thompson Building Materials, Inc.*, 749 F.2d 1396, 1403 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985). Others have recast that presumption merely to shift the burden of proof in arbitration and not also to raise that burden from the simple preponderance of evidence in a *de novo* inquiry to the "unreasonable or clearly erroneous" standard MPPAA actually specifies. *Washington Star Co. v. International Typographical U. Negotiated Pension Plan*, 729 F.2d 1502, 1511 (D.C. Cir. 1984); *Republic Indus., Inc. v. Teamsters Joint Council*, 718 F.2d 628, 641 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). In *Washington Star*, the court also stated: "We conclude that the trustees' fiduciary duties require them to act neutrally and reasonably in making withdrawal liability determinations." 729 F.2d at 1511. Similarly, the Second Circuit concluded that, because both employees and employers appointed trustees, the trustees were not biased. *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 855 (2d Cir.), *cert. denied sub nom. Sibley, Lindsay & Curr v. Bakery, Confec. and Tobacco Workers*, 467 U.S. 1257 (1984).

> "We emphasize first that we do not perceive the trustees to be performing an adjudicatory role when they calculate the withdrawal liability, and so we do not believe we in any way mar the purity of the judicial process in deciding that their bias is not of constitutional dimension." *Keith Fulton, supra,* 762 F.2d at 1140; *see* J.S. App. 35a.

Appellants adopt a similar approach to justify reversal here. They assert that an important factor in the plans' ability to collect withdrawal liability is their right to rely in mandatory arbitration on the Arbitral Presumption,[4] which states:

> "For purposes of any proceeding under this section [1401], any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A).

On the face of the MPPAA statute, the scope of matters entitled to this presumption is the same as the scope of disputes subject to arbitral jurisdiction:

> "Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration." 29 U.S.C. § 1401(a)(1).

Appellants urge that this statutory scheme for enforcing the withdrawal liability claims of plan trustees does not violate due process because it does not confer upon MPPAA plan trustees

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[4] Brief for Appellant PBGC ("PBGC Br."), p. 41; Brief for Appellant United Retail & Whse. Emps. Teamsters U. Local No. 115 Pension Plan ("Plan Br."), pp. 32-33; Brief *Amicus Curiae* of the National Coordinating Committee for Multiemployer Plans ("NCCMP Br."), p. 4.

any authority to make case-specific, fact-based determinations. According to the PBGC's brief:

> "[Plan] trustees do not engage in any of the functions that normally attend an adjudicative decision. They do not determine the 'truth' of disputed versions of historical facts, they do not make credibility determinations, and they do not seek to arrive at the 'right' answer to a question". PBGC Br. 19.

The trustee "determinations" subject to MPPAA arbitration and the Arbitral Presumption are claimed to be so "extremely limited and circumscribed by statutory directives", PBGC Br. 34, that an unbiased decisionmaker is unnecessary. Appellants repeatedly justify the Arbitral Presumption by quoting legislative history to argue that this heavy presumption was designed and intended by Congress to reduce disputes and delay over "technical actuarial matters".[5]

Even appellants' limited view of the scope of MPPAA dispute procedures recognizes that plan trustees have the authority to make case-specific fact-based determinations in calculating withdrawal liability. Therefore an unbiased decisionmaker is constitutionally required. Tiger's own experience, and that of many other entities whose disputes have been reported, also demonstrates that ministerial calculations are not all that trustees determine or all that the Arbitral Presumption is claimed to protect. Appellants' rationale fails entirely because in practice MPPAA trustees and the PBGC assert substantial trustee authority to "determine" a wide range of issues against purportedly liable companies and demand that these assessments can be challenged only under mandatory MPPAA arbitrations, where they are sheltered by the Arbitral Presumption. These trustee determinations are the basis for massive liability assessments on which payments can begin even before MPPAA procedures are completed. 29 U.S.C.

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[5] PBGC Br. 8; Plan Br. 7; PBGC Jurisd. Statemt. 6 n.6; NCCMP Br. 13; *quoting* Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *S. 1076; The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* 20 (Comm. print 1980).

§ 1401(d). Their determinations are not so free of discretion or so ministerial in nature that they may constitutionally be presumed correct unless "clearly erroneous".

MPPAA provides that "when an employer withdraws from a multiemployer plan, the plan sponsor . . . shall (1) determine the amount of the employer's withdrawal liability". 29 U.S.C. § 1382.[6] Although this language does not expressly direct plan trustees to determine whether a withdrawal has occurred, federal courts have held that the fact that an employer has withdrawn within the meaning of MPPAA, including necessarily related issues of whether an exemption is applicable in a particular case, is an appropriate plan trustee determination and is, in the usual course, subject to the MPPAA dispute procedures. "The determinations generally required by 29 U.S.C. §§ 1381 through 1399 involve questions of whether an employer has . . . withdrawn from a plan and what the amount, if any, of its consequent liability should be."[7] Courts have also ordered arbitration (or foreclosed employers who failed to arbitrate from raising defenses) on a variety of other trustee determinations that are undeniably fact- and case-specific:

—Whether under the provisions of a collective bargaining agreement an employer effected a permanent cessation of operations on a particular date, and whether a binding agreement to withdraw from a MPPAA plan existed. *Warner-Lambert Co. v. United Retail & Whse. Emps. Teamsters Local No. 115 Pension Plan*, 791 F.2d 283, 287-88 (3d Cir. 1986).

—Whether sale of certain facilities constituted a withdrawal or an exempt "sale of assets" under 29 U.S.C. § 1384. *Grand Union Co. v. Food Employers Labor Rels. Ass'n*, 808 F.2d 66, 70 (D.C. Cir. 1987); *see also New York State Teamsters Conf. Pension & Ret. Fund v. St. Lawrence Transit Mix Corp.*, 612 F. Supp. 1003, 1009 (N.D.N.Y. 1985).

—Whether an employer's cessation of contributions during a labor dispute constituted a complete withdrawal or was within the statute's "labor dispute" exception, 29 U.S.C. § 1398, *Combs v. Adkins & Adkins Coal Co.*, 597 F. Supp. 122, 127 (D.C. Cir. 1984).

—Whether two motor freight terminals eight miles apart were separate "facilities" within the meaning of 29 U.S.C. § 1397(a)(2) for calculating withdrawal liability. *Republic Indus., Inc. v. Teamsters Joint Council*, 718 F.2d 628, 634 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984); *accord Williamson Shaft Contracting Co. v. United Mine Workers 1974 Pension Plan*, 585 F. Supp. 633, 634 (W.D. Pa. 1984).

The PBGC here urges that the lower court "seriously misapprehended the scope of discretion accorded to the trustees in determining withdrawal liability." PBGC Br. 18. Yet the PBGC has repeatedly advised MPPAA plans that plan trustees are to make a substantial range of unconstrained, case-specific determinations and that these determinations are subject to MPPAA dispute procedures, including mandatory arbitration under Section 1401(a). The PBGC has opined:

> "Under the multiemployer provisions of ERISA, *the initial responsibility for deciding factual questions necessary to determine whether any particular action constitutes a*

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[6] Subject to various exceptions and conditions, "a complete withdrawal from a multiemployer plan occurs when an employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a). Subject to various exceptions and criteria, "there is a partial withdrawal by an employer from a plan on the last day of a plan year if for such plan year (1) there is a 70-percent contribution decline, or (2) there is a partial cessation of the employer's contribution obligation." 29 U.S.C. § 1385(a).

[7] *Baldwin v. Shopmen's Ironworkers Pension Trust*, 3 E.B.C. 1713, 1716 (C.D. Cal. 1982); *see, e.g., Warner-Lambert Co. v. United Retail & Whse. Emps. Teamsters Local No. 115 Pension Plan*, 791 F.2d 283, 284 (3d Cir. 1986). The PBGC has likewise advised that "a dispute over . . . a determination regarding the occurrence of a withdrawal would be subject to the arbitration provision of" MPPAA. *E.g.*, PBGC Op. 83-18, 10 Pens. Rep. (BNA) 1819 (1983). *See* pp. 13-16 *infra*. In urging reversal, the brief *amicus curiae* of the Mine Workers expressly acknowledges that this determination is made by the plan trustees. Brief of the Trustees of the United Mine Workers of America 1950 and 1974 Pension Plans as Amici Curiae in Support of Appellant ("UMW Br."), p. 17.

> *withdrawal* from a multiemployer plan lies with the plan sponsor. . . . [A]ny disputes between a plan sponsor and an employer on these issues are to be resolved first through arbitration and then, if necessary, in the courts." PBGC Op. 86-21 (1986) (emphasis added).[8]

The PBGC has also opined that plan trustees may determine and subject to MPPAA dispute procedures the interpretation of statutory provisions:

> "The MPPAA places the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan and for determining the amount of any liability resulting therefrom on the plan sponsor. Similarly the plan sponsor, consistent with his or her fiduciary responsibilities, would be initially responsible for determining such questions as the meaning of 'substantially all' in [29 U.S.C. § 1389]. If a plan sponsor makes any such determination, and the employer objects in any way, ERISA provides in [29 U.S.C. §§ 1399 and 1401] a procedure for resolving the dispute." PBGC Op. 83-23 (1983).[9]

The determination that a withdrawal has occurred and the issues reflected in that determination permit plan trustees substantial latitude in making decisions that result in imposition

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[8] The PBGC Opinions cited herein are available on LEXIS, Labor library, PBGC file.

[9] The PBGC states that its position is that a MPPAA arbitrator need not presume that a plan's legal conclusions are correct, although this position was not incorporated in its final rule on MPPAA arbitration. PBGC Br. 40 n.33. The PBGC's present reliance on this position ignores the trustees' initial ability to "determine" both the facts and the law and their resulting ability to limit review. Plan trustees can formulate their "determinations" and characterize issues as "factual" or "legal". In doing so plan trustees can both achieve the desired result and substantially protect that result from any *de novo* review limited to purely legal questions. In arguing that a MPPAA dispute should not go forward in court as opposed to arbitration, the PBGC recently argued in the Seventh Circuit that "characterizing withdrawal liability issues as 'purely legal' or 'factual' is easier in theory than in practice . . . and in any event an inventive employer will be able to characterize at least one issue as 'purely legal.'" PBGC Br. in *Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, Nos. 86-1963, 1964, 2241 (7th Cir. Sept. 15, 1986), p. 10.

of withdrawal liability. Among the case-specific questions the PBGC has expressly opined that plan trustees should determine and then subject to MPPAA dispute procedures and presumptions are the following:

> —Whether a cessation of contributions during a labor dispute constitutes a withdrawal as a "permanent cessation" under 29 U.S.C. § 1383(a) or an exempt "suspension during a labor dispute" under 29 U.S.C. § 1398. PBGC Op. 82-21 (1982).
>
> —Whether a shift of operations from one discrete geographic location to another is a continuation of operations or a cessation of operations at a facility, triggering a partial withdrawal, and whether the change in location was a "sham" intended to avoid the occurrence of a withdrawal. PBGC Op. 82-22 (1982).
>
> —Whether a company that leased employees from a MPPAA employer but had not itself signed a collective bargaining agreement or contributed to a MPPAA plan nonetheless had a duty under federal labor law to make pension contributions and thus had an obligation to pay withdrawal liability under 29 U.S.C. § 1392(a), and whether termination of the leasing agreement constituted a withdrawal. PBGC Op. 85-14, 13 Pens. Rep. (BNA) 30 (1986).
>
> —Whether "under all the circumstances" the principal purpose of a transaction that would otherwise not constitute a withdrawal was intended to evade or avoid withdrawal liability and therefore could be determined to be a liability-triggering withdrawal. PBGC Op. 85-15, 13 Pens. Rep. (BNA) 29-30 (1986).

Even calculations determining the amount of withdrawal liability are premised in part on case-specific trustee determinations subject to the MPPAA dispute procedures. *See Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, 636 F. Supp. 641, 674 & n.43 (N.D. Ill. 1986) (holding that applying Section

1401(a)(3)(A) to calculations of withdrawal liability violates due process).[10] Plan trustees, with the encouragement of the PBGC, have claimed the authority in the course of their withdrawal liability calculations to disregard transactions that they believe evidence "a principal purpose . . . to evade or avoid" withdrawal liability. 29 U.S.C. § 1392(c); *see Robbins, supra,* 636 F. Supp. at 657 n.27; **PBGC Op.** 83-10, 10 Pens. Rep. (BNA) 1387 (1983) (determination of contribution base may ignore liability-reducing transactions determined to "evade or avoid" liability).

Tiger's own experience demonstrates the wider range of determinations that MPPAA plans and the PBGC claim to be within the authority of the plan trustees and subject to dispute only under MPPAA dispute procedures and the Arbitral Presumption. In the *Flying Tiger* action, the district court concluded in its second opinion that the plans' assertions that Tiger was an "employer" with Hall's, notwithstanding the divestiture of Hall's by Tiger a year before any withdrawal liability was incurred, raised issues that must be arbitrated between the plans and Tiger because the plans purported to disregard the divestiture as a sham transaction intended to "evade or avoid" MPPAA liability. The district court stated that "once facts are in dispute . . . the court's task becomes more difficult and intercedes into the proper role of the arbitrator". 7 E.B.C. at 2397. The PBGC had advised the district court that the question of Tiger's purported "employer" status under MPPAA—the dispute the plans insisted could only be arbitrated—should be arbitrated as a disputed plan determination under Section 1401(a):

> "The PBGC believes . . . that arbitration should proceed. . . . [T]he PBGC agrees that the Court's concerns can be alleviated by the 'alternative' suggested by Central States . . . of a 'stay' of this action pending arbitration of the issues relating to the identity of the employer in *Tiger* . . . [N]othing in the statute prohibits a court from ordering the statutorily mandated arbitration. See 29 U.S.C. § 1401(a)(1)." Letter of E. R. Mackiewicz (by P. H. Gould) to Hon. C. M. Wright, dated October 6, 1986.

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[10] In *Combs v. Western Coal Corp.*, 611 F. Supp. 917 (D.D.C. 1985), a plan's admittedly erroneous fact determination that a division was a distinct entity from the withdrawn employer resulted in an over-assessment of withdrawal liability of approximately $250,000. The plan recognized its error but refused to alter its assessment and maintained that the employer, which had requested arbitration, had failed to properly initiate arbitration pursuant to plan rules. *Id.* at 919. The court agreed that the employer had failed properly to initiate arbitration and entered judgment for the withdrawal liability amount calculated from the fund's admitted factual error. *Id.* at 923.

The subsequent "determination" by the Central States trustees that Tiger was an "employer" with Hall's because in the trustees' view "a principal purpose of the Hall's divestiture . . . was to avoid or evade withdrawal liability" can only be described as a case-specific attempt to adjudicate Tiger's liability. Central States' attempts to force dispute of this "determination" into a MPPAA arbitration are obviously designed to avoid *de novo* inquiry by an unbiased decisionmaker.

MPPAA cannot fairly be read to state that trustee determinations do not encompass case-specific and factual determinations of liability requiring an unbiased decisionmaker. The Hall's plans persuaded the district court that Tiger's case should be distinguished from other cases refusing to compel arbitration of "employer" status because their disputed factual assertions presented the equivalent of a fraud case. *Flying Tiger, supra,* 7 E.B.C. at 2397. Other courts have accepted the arguments of MPPAA plans and the PBGC and ordered arbitration of other MPPAA disputes on the ground that a factual issue was present. *E.g., Warner-Lambert, supra,* 791 F.2d at 287-88; *Williamson Shaft, supra,* 585 F. Supp. at 635. If Section 1401 is properly read to limit arbitration to disputes about trustees' ministerial calculations of withdrawal liability, then the decisions compelling arbitration of other, much broader disputes arising from withdrawal liability claims cannot be correct.

To support the view that no "adjudication" is implicated in a trustee determination and the right to an impartial decisionmaker does not apply, appellants and their *amici* rely on four decisions of this Court. Their reliance is misplaced. In each of those cases the Court found that no possibility of bias or interest was shown. *Schweicker v. McClure*, 456 U.S. 188, 196 (1982) ("no basis" for conclusion of bias); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980) ("too remote and insubstantial"); *Friedman v. Rogers*, 440 U.S. 1, 18 (1979); *Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n*, 426 U.S. 482, 496 (1976). Moreover, the fact determinations of the allegedly biased decisionmaker were subject to *de novo* review in *Marshall*, 446 U.S. at 245, and in *Hortonville*, 426 U.S. at 485, 494 ("no possibility of an erroneous factual determination"), and the regulatory scheme in *Schweicker* provided for two *de novo* reviews, by a reviewing official and a hearing officer. 456 U.S. at 191. Those cases do not indicate that due process permits a critical determination of liability, however ministerial, to be entrusted to a biased party and insulated from *de novo* review.[11] *Cf. Dixon v. Love*, 431 U.S. 105, 109-10, 113-14 (1977) (examining procedural remedies to correct deprivation of driver's license based on clerical error).

B. *Multiemployer Plan Trustees Are Undeniably Biased in Favor of Those Plans and Cannot "Hold the Balance Nice, Clear and True" Between the Plan and its Adversary—the Withdrawing Employer.*

The withdrawal liability determinations made by MPPAA trustees commonly encompass case-specific determinations based on historic facts and need an unbiased, disinterested decisionmaker before their enforcement can have any claim to due process. The trustees' fiduciary obligations to their plans create a clear possibility of favoritism toward the plan and against the withdrawn former participant sufficient to disqualify them as unbiased decisionmakers.

Addressing the apparent bias of plan trustees, appellants and their *amici* effectively admit that, whether or not plan trustees are legally obligated to be biased to maximize withdrawal liability in every case, they are in fact biased.[12] The appellant plan, whose trustees' determinations are challenged here, accepts that those trustees are biased but says the bias is entirely appropriate:

> "The bias of the trustees is permissible because the trustees are *obligated by Congress to be biased in favor of pension plans.* This 'bias' mirrors the 'bias' of MPPAA. . . . By its very nature, an assessment of withdrawal liability is intended to benefit the interests of the plan over those of a withdrawing employer. Thus, it is entirely appropriate that the trustees assess withdrawal liability and that their judgments are presumed correct, for *what is at issue is what is best for the plan.*" Plan Br. 30 (emphasis added).[13]

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[11] *See Wolkenstein v. Reville*, 694 F.2d 35, 39-41 (2d Cir. 1982) (Friendly, J.), *cert. denied*, 462 U.S. 1105 (1983) (examining and rejecting the argument that the determination whether a public employee had engaged in a strike and the penalty to impose on a public employee who had done so was not adjudicative).

[12] Multiemployer plan trustees have personal and institutional interests adverse to the allegedly withdrawing employer and therefore could not be considered unbiased individuals even were they free of their fiduciary obligations. Employee trustees are appointed by the union and may seek to use withdrawal liability to increase benefits and thereby gain or keep the support of their constituents. There is no reason to assume that union trustees will be indulgent toward employers, particularly employers withdrawing as the result of ceasing operations covered by the collective bargaining agreement with that union. Employer trustees may seek to rely on withdrawal liability assessments to reduce the need for increases in contributions. Employer trustees' constituents—employers *remaining* in the plan—have economic interests directly opposed to the interests of the *withdrawing* employer or other companies that might be claimed liable with the former plan participant. " 'Employer withdrawals . . . reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels' ". *Pension Ben. Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 722 n.2 (1984) (citation omitted).

[13] The trustees' single-mindedness was also emphasized by MPPAA's Senate sponsor:

> "In all instances the actions of the trustees must be made with the sole interest of the plan's beneficiaries in mind." 126 Cong. Rec. 20182 (1980) (Sen. Williams).

The appellant plan's view accords with Judge Aldrich's metaphor for the plight of the withdrawing employer:

> "[H]e finds himself, without possibility of relief, in a boxing ring from which he had been told he might be exempt, the prize being his own money, in an uneven match, but assured by the referee that he would see to it that it was a fair fight." *Keith Fulton, supra*, 762 F.2d at 1146 (Aldrich, J., dissenting).

It does not push Judge Aldrich's metaphor too far to suggest that the Arbitral Presumption favoring the plan means that anyone forced into the MPPAA ring with a plan can win only by a clear knockout.

The plan trustees in this case obviously understand that their duty in determining withdrawal liability is to serve the interests of the plan and is not to "hold the balance nice, clear and true" between the plan and the purportedly withdrawn employer whose claimed liability to the plan is at issue. As the court below recognized, this duty compels all plan trustees to resolve MPPAA withdrawal liability issues in favor of the plan's interests. Appellants concede that the trustees are obliged "to achieve a result solely in the interest of plan participants and beneficiaries." PBGC Br. 32; *accord* Plan Br. 21. A decisionmaker whose only inquiry in a case before him is whether his principal, one of the parties before him, desires a particular outcome is clearly faced with "a possible temptation . . . which might lead him not to hold the balance nice, clear and true" between the plan and the employer. *Tumey, supra,* 273 U.S. at 532.

Another response of appellants to the obvious bias of the trustees is to posit that plan trustees might, to serve long-term interests of the plan in encouraging new employer enrollment, choose occasionally to forbear from overreaching. PBGC Br. 31-33; Plan Br. 23. Appellants suggest that trustees "must also consider whether *minimizing* withdrawal liability assessments to encourage employers to enter the plan would further Congress's goal of long-term stability." PBGC Br. 34; *accord* Plan Br. 21, *quoting Keith Fulton, supra,* 762 F.2d at 1142-43. Appellants give no indication or reason to believe that any MPPAA plan has minimized withdrawal liability claims to encourage new employers.[14]

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[14] A plan interested in encouraging new membership presumably would be more likely to avail itself of the optional "free look" rule for new employers, 29 U.S.C. § 1390, than to minimize the witndrawal liability of a former employer in the hope that a prospective new employer would be led to believe that the plan will be fair to it and therefore join. The Comptroller General's study cited by appellants states that 89% of surveyed MPPAA plans choose not to offer the "free look" option, a statistic that indicates that trustees have not been much motivated by solicitude to new entrants. Comptroller General's Report, *Effects of Liabilities Assessed Employers Withdrawing from Multiemployer Pension Plans,* GAO/HRD-85-58, p. 62 (1985).

Congress created in MPPAA an administrative scheme that permits plan trustees to make withdrawal liability determinations, decisions that the Fifth Amendment requires be made or reviewed *de novo* by an unbiased and disinterested decisionmaker if they are to be enforceable liabilities. The likely result of the trustees' bias is that they will err in favor of their plans. Indeed, the National Coordinating Committee asserts in its *amicus* brief that almost half of the reported MPPAA arbitrations concluded that the trustees' determination under review was "unreasonable or clearly erroneous". NCCMP Br. 14 & n.10. It stands to reason that some portion of the other half of the arbitrated trustee determinations were also erroneous, although not sufficiently "clearly erroneous" to overcome the Arbitral Presumption. Even under the "flexible" approach to due process urged by appellants, Plan Br. 18; PBGC Br. 29; *see Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), a procedural scheme likely more than half the time to produce an erroneous result favoring one side cannot pass constitutional muster as adequately assuring a correct result. Moreover, the right to an unbiased decisionmaker cannot be balanced away.[15]

The MPPAA provision challenged here is not constitutional because Congress intended to favor pension plans, as the appellant plan appears to argue, Plan Br. 30, or because a fairer procedure would be a greater administrative burden on these plans, as the PBGC maintains. PBGC Br. 41-42. The purported hardship to plans of increased administrative expense (much of it recoverable if their claims are upheld, 29 U.S.C. §§ 1401(a)(2), 1451(e)), and their preference for ease in using the "atomic bomb of withdrawal liability" (as one Hall's plan aptly characterized it to the *Flying Tiger* district court) does not extinguish the due process right of an employer to an unbiased adjudicative decision of his liability.

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[15] The Court of Appeals correctly recognized that this Court's decisions in *Mathews v. Eldridge* and similar cases does not authorize courts to balance the value of an unbiased decisionmaker against the cost of providing one. J.S. App. 20a. *Mathews* and cases applying it recognize that an unbiased decisionmaker is part of the minimum required in every case. 424 U.S. at 344; *accord Arnett v. Kennedy,* 416 U.S. 134 (1974) (White, J., concurring); *see, e.g., Schweicker, supra; Marshall v. Jerrico, supra; Mackey v. Montrym,* 443 U.S. 1, 13 (1979); *Parham v. J.R.,* 442 U.S. 584, 606 (1979); *Ingraham v. Wright,* 430 U.S. 651, 682 (1977). An impartial decisionmaker, like notice and an opportunity to be heard, is a fundamental element of due process not subject to balancing away. *See Memphis Light, Gas & Water Div'n v. Craft,* 436 U.S. 1, 15 (1978); Friendly, *Some Kind of Hearing,* 123 U. Pa. L. Rev. 1267, 1279 (1975).

C. Requiring that a MPPAA Arbitration Accept Biased Trustee Determinations Unless Clearly Erroneous Prevents an Employer from Receiving Due Process in that Arbitration.

The Court of Appeals correctly concluded "that where an initial hearing is tainted by bias, arbitration cannot provide the requisite fair hearing if the arbitration is not *de novo.*" J.S. App. 27a.[16] The lower court decided that "a full and fair *de novo* hearing before an arbitrator" would cure the bias; that Section 1401(a)(3)(A) could be severed from the remainder of the MPPAA scheme; and that "the severing of § 1401(a)(3)(A) rescue[s] the scheme's constitutionality". J.S. App. 31a. This Court should affirm these conclusions.

MPPAA's challenged presumption against the employer cannot fairly be construed, as the Mine Workers urge, merely to assign the burden of proof to the employer. UMW Br. 19. Congress's use of the well understood term "clearly erroneous"

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[16] The court relied on its earlier decision in *Goodman v. Laborers' Int'l Union*, 742 F.2d 780, 785 (3d Cir. 1984), that less than a full *de novo* determination on a new record would be insufficient to cure a decision tainted by bias. The precise issue in *Goodman* and similar cases was whether labor union procedures in disciplining a member constituted a "full and fair hearing" under Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(5). *Accord Myers v. Affiliated Property Craftsmen*, 667 F.2d 817, 821 (9th Cir. 1982); *Rosario v. Ladies Garment Cutters' U.*, 605 F.2d 1228, 1243 (2d Cir. 1979), *cert. denied*, 446 U.S. 919 (1980); *see Perry v. Milk Drivers' and Dairy Emps. U.*, 656 F.2d 536, 539 (9th Cir. 1981) (*de novo* review satisfies LMRDA). The rule in *Goodman* accords with the views of other courts that a trial *de novo* would cure a biased determination. *Marshall v. Jerrico, supra*, 446 U.S. at 245; *Commonwealth of Pennsylvania v. United States*, 781 F.2d 334, 337 (3d Cir. 1986); *Wolkenstein v. Reville, supra*, 694 F.2d at 43. These three cases reason that *de novo* redetermination would cure a biased decision, but none concluded that a biased decision was present or held that *de novo* review is constitutionally sufficient.

to constrain arbitral review plainly sets out a greater burden than the "preponderance of the evidence" standard that *de novo* review entails.[17] This Court recently explained Fed. R. Civ. P. 52(a)'s "clearly erroneous" standard:

> "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty . . . if it undertakes to duplicate the role of the lower court. 'In applying the clearly erroneous standard . . ., appellate courts must constantly have in mind that their function is not to decide factual issues *de novo.*' " *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985), *quoting Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

This Court should construe statutes such as MPPAA to avoid constitutional questions if a saving construction is "fairly possible", but

> "this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication; ' "[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute" or judicially rewriting it.' *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964) (quoting *Scales v. United States*, 367 U.S. 203, 211 (1961))." *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3252 (1986).

Appellants claim Congress intended in MPPAA to reject "a procedure aimed at reaching the 'fairest' result to employers [because that] would instead be unfair to plans" and to enact instead "litigation-dampening presumptions", PBGC Br. 43-45, that were "designed by Congress to assist multi-employer plans". Plan Br. 33. Such a congressional intent would not justify depriving employers of due process, but these arguments about Congress's purpose show just how hard it is to construe this language of MPPAA in a manner consistent with due process and the purported congressional purpose.

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[17] Congress's use of a term with a long-settled meaning usually requires the inference that Congress intended to adopt that meaning. *National Labor Rels. Bd. v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).

Tiger joins appellees in urging that the Arbitral Presumption is unconstitutional, even when invoked to protect trustee determinations on only "technical actuarial matters" that purportedly permit minimal scope for trustee bias. Should the Court reject that argument and adopt appellants' view of the very limited scope of matters subject to mandatory MPPAA arbitration and the Arbitral Presumption, this saving construction should expressly construe Sections 1401(a)(1) and 1401(a)(3)(A) to apply only to such limited matters. The Arbitral Presumption cannot constitutionally be applied to the wider range of case-specific claims and findings repeatedly made by MPPAA plans and claimed by both MPPAA plans and the PBGC to be plan trustee determinations subject to mandatory MPPAA arbitration and sheltered by the Arbitral Presumption.

CONCLUSION

For the foregoing reasons, and those set forth in the brief of the appellants and in the opinion below, the Court should affirm the decision below that 29 U.S.C. § 1401(a)(3)(A) violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

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Respectfully submitted,

Douglas D. Broadwater
(*Counsel of Record*)
Richard Liebeskind, Jr.
Donna M. DeSilva
One Chase Manhattan Plaza
New York, N. Y. 10005
(212) 422-3000

R. Franklin Balotti
Jesse A. Finkelstein
William W. Bowser
One Rodney Square
Wilmington, Delaware 19899
(302) 658-6541

Attorneys for The Flying Tiger Line Inc., et al., as amici curiae in support of affirmance

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N. Y. 10005
(212) 422-3000

RICHARDS, LAYTON & FINGER
One Rodney Square
Wilmington, Delaware 19899
(302) 658-6541

ROBERT J. HARTER, JR.
Tiger International, Inc.
LAWRENCE M. NAGIN
The Flying Tiger Line Inc.
7401 World Way West
Los Angeles, California
(213) 646-6161

Of Counsel